In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, plaintiff, *v.* THE STATE OF OKLAHOMA.	No. 25, Original.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an original bill against the state of Oklahoma brought in this court by the United States, seeking to establish its claim as a prior creditor in the funds of an insolvent state bank.

The bill avers that the United States, as guardian of noncompetent Indians of the Five Civilized Tribes in the state of Oklahoma, has received large sums of money arising from leases of lands belonging to restricted Indians of those tribes which the Secretary of the Interior was authorized by the act of May 25, 1918 (ch. 86, 40 Stat. 561, 592), to deposit in the banks of Oklahoma; that on October 26, 1921, and for several years prior thereto, there was situated at Guthrie, Oklahoma, a banking institution known as the Okla-

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homa State Bank, incorporated under the laws of that state and engaged in a general banking business.

The bill further avers that pursuant to the act of May 25, 1918, the Secretary of the Interior caused to be deposited in the bank at Guthrie certain sums of money received on behalf of restricted and noncompetent Indians, such deposits having been made, under rules and regulations prescribed by the Secretary, in the name of the cashier and special disbursing agent of the Five Civilized Tribes, on time deposit bearing interest at the rate of 4¾ per cent per annum, and that on October 26, 1921, the sum so deposited amounted to $42,000; that before the deposits were made the secretary required the bank to deliver to the United States a bond, with the Fidelity & Casualty Company of New York as surety, to secure the payment of such money, which bond is in full force and effect.

The bill further alleges that on October 7, 1921, a bank examiner of the state of Oklahoma, in the discharge of his duties, made an investigation of the Oklahoma State Bank at Guthrie, and found that it was insolvent and unable to pay its debts, whereupon he reported the matter to the bank commissioner of the state who, on October 26, 1921, and pursuant to the authority vested in him by the laws of that state, adjudged the bank to be insolvent, and took charge of its records, books, and assets for the purpose of liquidation; that he still has charge of the same, and that on the date last named the sum of $42,000 was

due by the bank to the United States, no part of which has been paid.

The bill proceeds to allege that the assets of the bank in the hands of the bank commissioner are in excess of the government's claim of $42,000, and that by virtue of the provisions of § 3466 of the Revised Statutes, the United States is entitled to have its debts first satisfied and paid in full before other creditors are paid anything; and demand has accordingly been made on the bank commissioner to pay the $42,000, with interest from October 26, 1921; but, the bill alleges, this demand has been refused upon the ground that the state of Oklahoma under its laws has a prior lien upon the assets of the bank for the benefit of the depositors' guarantee fund for the purpose of paying the bank's unsecured depositors and creditors, and upon the further ground that the United States deposited the money with full knowledge of the statutory laws of Oklahoma, which provide for and create a lien for the benefit of depositors, and that when the deposit was made by the United States the latter thereby consented to the method of administration prescribed by the state laws in the event of insolvency, and that the act of making the deposit was, therefore, a waiver of the rights of the United States under § 3466 of the Revised Statutes.

The bill accordingly prays that the State bank commissioner be enjoined from paying out any of the assets of the bank before the debt due the United

States has been fully paid, and that the defendant, through its bank commissioner, be required to pay the debt due the United States before paying out any of its funds to any other person.

The state of Oklahoma has filed a motion to dismiss the bill upon the following grounds:

A. That § 3466, Revised Statutes, is inapplicable and unenforceable against the state in the administration of the liquidation of a state bank.

B. That the state has, under its laws, a lien upon all the assets of the bank for its reimbursement by reason of its payment to the unsecured depositors of the bank, and that the alleged rights of the United States are inapplicable against the state until the obligation for which the lien was given is fully paid and satisfied.

C. That § 3466, Revised Statutes, is invalid in so far as it asserts priority of payment of a debt due the United States in opposition to the payment of a debt due the state.

ARGUMENT.

I.

This court has jurisdiction of the cause.

The state of Oklahoma is the proper party defendant and this court has original jurisdiction. When a state bank in Oklahoma becomes insolvent the state, by the action of its bank commissioner, acquires title to the bank's assets. *State* v. *Cockrell*, 27 Okla. 630. Consequently a suit against the bank

commissioner is in effect a suit against the state. *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461; *American Water Co.* v. *Lankford*, *id.* 496; *Farish* v. *State Banking Board*, *id.* 498.

In the cases cited it was held that a suit against the state banking board and the bank commissioner to compel payments from and distribution of the depositors' guaranty fund is a suit against the state, and therefore, under the eleventh amendment, can not be maintained in the federal court. But the holding that such a suit can not be maintained in the federal court has, of course, no application to a suit instituted against the state by the United States in this court.

II.

Assets of an insolvent State bank in Oklahoma are subject to the Government's claim as a prior creditor under Revised Statutes of the United States, § 3466.

This statute provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by

> process of law, as to cases in which an act of bankruptcy is committed.

From this it will be seen that whenever a debtor is divested of his property in any of the ways mentioned in the section quoted, the "person who becomes invested with the title is thereby made a trustee for the United States and is bound to pay their debt first out of the proceeds of the debtor's property." *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 132. But, to entitle the United States to priority, there must be bankruptcy or insolvency as the latter is defined by the statutes or the authorities.

The bank in this case was adjudged insolvent by the bank commissioner, who under the law was authorized to take such action.

Section 302 of the Revised Laws of Oklahoma, 1910, provides:

> * * * Whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers, and directors.

From the allegations of the bill it will be seen that the bank was adjudged insolvent pursuant to the provisions of the state laws, and the situation is one where, under R. S. § 3466, the United States is entitled to be paid first. The position of the bank commissioner in taking charge of the bank's

affairs and collecting and distributing its assets is, under the state decisions, analogous to that of a receiver or trustee in bankruptcy or of an assignee for the benefit of creditors. *Briscoe* v. *Hamer*, 50 Okla. 281.

As stated, therefore, the case is one where the United States is entitled to be paid first, unless by reason of §303 of the state laws the state itself has a prior lien on the bank's assets for the benefit of the depositors' guaranty fund.

Section 303, Revised Statutes of Oklahoma of 1910, provides:

> In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations, or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund.

It will thus be seen that the lien of the state does not attach until the bank commissioner takes possession of the bank and its assets. Before he may do that, he must find the bank to be insolvent, and immediately upon his doing that the priority of the United States attaches. The state, therefore, has no anterior lien such as would take precedence over the claim of the United States.

Moreover, it has been decided that the laws of the state can not create priority in favor ofother creditors and so defeat the priority of the United States. *Field* v. *United States*, 9 Pet. 182, 200. In the case just cited, it is said:

> The local laws of the state could not and did not bind them (the United States) in their rights. They could not create a priority in favor of other creditors in cases of insolvency which should supersede that of the United States. The priority of the latter attached by the laws of the United States.

That priority does not yield to any claim of creditors, however high may be the dignity of their debt. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386. What the laws of the state may provide is therefore immaterial, the federal law being paramount and controlling.

There is no force in the argument that by depositing the money in the state bank the United States consented to the state's method of distributing the bank's funds and thereby waived its claim to priority, because Congress alone has power to waive rights of

the government, and there is no pretence that Congress has done so in this case.

Nor was the United States compelled to proceed on the bond of the surety company before enforcing its direct remedy against the debtor, for the settled rule of equity is to the contrary. *Lewis* v. *United States*, 92 U. S. 618.

III.

The United States is entitled to priority in regard to moneys which it has deposited as guardian of the Indians.

It has been held that in determining the priority of the government, the form of the indebtedness is immaterial, and it may be either legal or equitable. *Lewis* v. *United States, supra.*

The money deposited in this case was trust money held by the United States for the benefit of restricted Indians. The bank did not know the Indians in the transaction but dealt only with the government. The money was not deposited by the Indians or at their suggestion, but was placed in the bank by the Secretary of the Interior pursuant to the provisions of the act of May 25, 1918; and if there is any loss it must be ultimately borne by the government and not by the Indians.

There is no reason either in logic or in law why the government should not be given priority in such a case as this, because, just as this money was held by it in trust for the Indians, so is other money belonging to it held in trust for the whole people of the

country. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158.

A case in point is that of *Allen* v. *United States*, 17 Wall. 207. In that case, Russell, Majors, and Waddell, partners in business, being insolvent, executed deeds of assignment to Allen and one Massey, conveying all their property in trust for their creditors. Following that conveyance the assignees sold to the United States a portion of the property thus conveyed, consisting of wagons and oxen, for a sum exceeding $112,000. Of the sum mentioned only a part was paid by the United States, leaving a balance of $71,491, payment of which was refused. Thereupon, Allen and Massey filed suit in the Court of Claims for the balance.

Prior to their assignment Russell, Majors, and Waddell had collusively received from the disbursing clerk of the Interior Department certain bonds held by the United States in trust for various tribes of Indians, amounting in the aggregate to $870,000. These were bonds of certain of the states in which Indian money had been invested and the bonds were placed in the Interior Department for safekeeping. These bonds were used by Russell, Majors, and Waddell and were not thereafter returned to the government. 5 Ct. Cl. 339.

The government contended that it was entitled to set-off against the claim of Allen, as assignee, the debt due by Russell, Majors, and Waddell on account of their illegal conversion of the Indian trust

bonds. And this court sustained that contention, holding that the government was entitled to priority of payment as to that debt.

It is true that in the *Allen case* the money was invested in the state bonds pursuant to treaty stipulations (act of July 12, 1862, 12 Stat. 539), but that does not alter the case, because, since the passage of the act of March 3, 1871, embodied in §2079, R. S., Congress has seen fit to govern Indian tribes by acts of Congress rather than through treaties.

If by taking these Indian trust bonds from the possession of the Secretary of the Interior, Russell, Majors, and Waddell became indebted to the United States, to satisfy which the latter was entitled to priority of payment from funds in the hands of the assignees, it seems to be equally clear that the United States is entitled to priority in the matter of the Indian money which it had deposited in the State bank in this case, because, just as Congress by act of July 12, 1862, *supra*, ordered the Indians credited with the amount of the trust bonds that had been stolen in the *Allen case*, so here in the event of loss through failure of the bank it will be bound to credit the Indians with the amount of such loss, since the money was deposited pursuant to act of Congress.

The relation of the United States to these Indians is set forth in the decision of this court in *Heckman* v. *United States*, 224 U. S. 413, 444, where Mr. Justice

Hughes, who delivered the opinion of the court, used the following language:

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

It is therefore respectfully submitted that a decree should be entered declaring the United States to be a preferred creditor of the state in the sum of $42,000, with interest from October 26, 1921, and directing the state to pay the amount out of the trust fund in its hands to the exclusion of the claims of any other creditor.

JAMES M. BECK,
Solicitor General.
WILLIAM D. RITER,
Assistant Attorney General.
S. W. WILLIAMS,
Special Assistant to the Attorney General.

NOVEMBER, 1922.

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In the Supreme Court of the United States

October Term, 1922.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF OKLAHOMA,
Defendant.

No. 25
Original

BRIEF FOR THE STATE OF OKLAHOMA

In Support of Motion to Dismiss.

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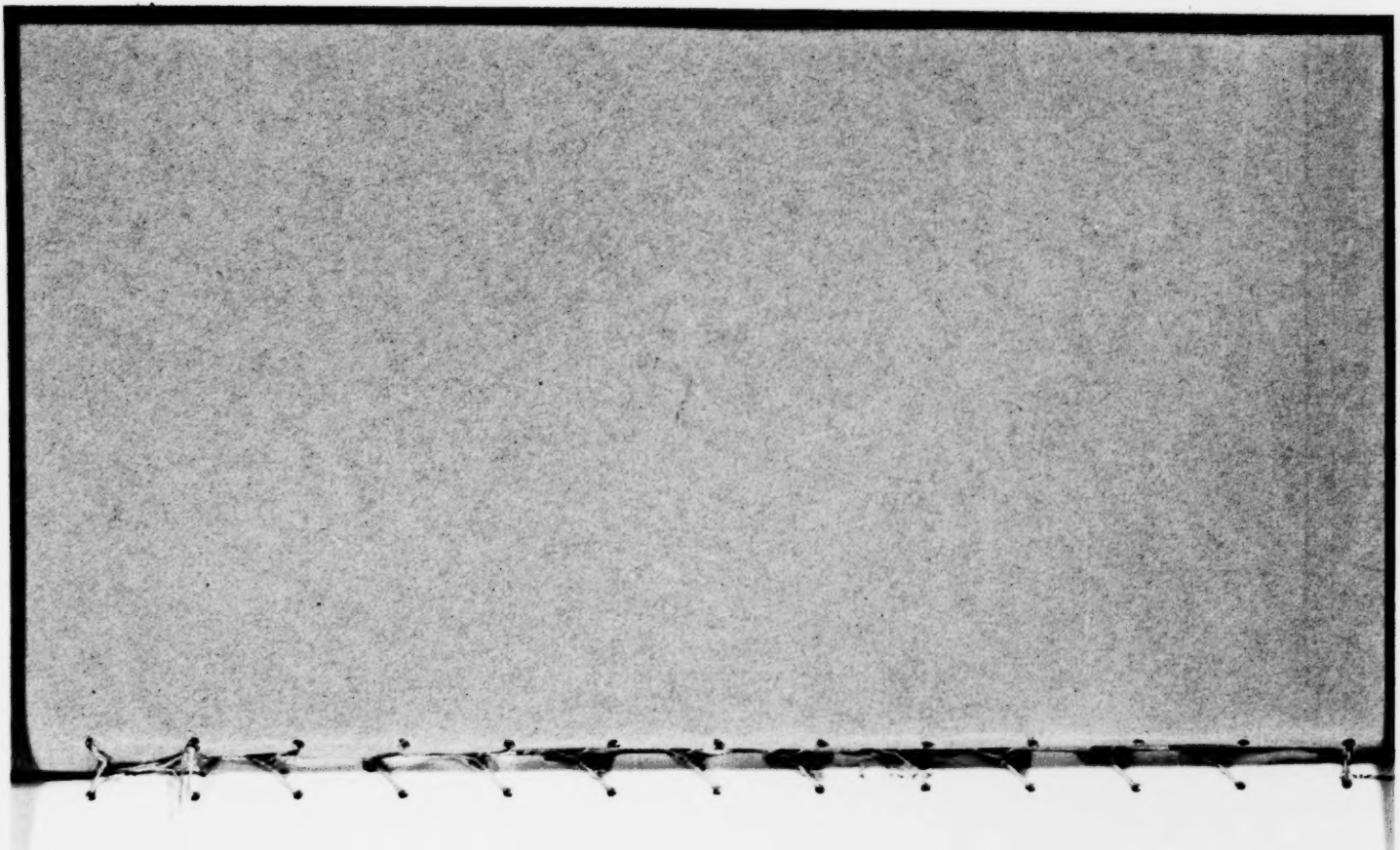
Barlow Publishing Company.



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In the Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF OKLAHOMA,
Defendant.

No. 25
Original

Pleadings in Case.

In this case, the United States of America has filed their bill of complaint against the State of Oklahoma, which is as follows:

> "The United States of America, by its Attorney General and its Solicitor General, brings this suit against the State of Oklahoma, and alleges and shows as follows:
>
> I.
>
> That the plaintiff is guardian of incompetent and restricted Indians residing within its territorial confines, and especially of those Indians who are alloted members of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Tribes or Nations, commonly known as the Five Civilized Tribes, resident in the defendant State; that the United States, through its Congress, from time to time has enacted

laws governing the care of property and estates held in the names of such incompetent and restricted Indians, including the care, custody, management, and control of their individual funds; that the agency of the plaintiff in the discharge of its duties as such guardian is the Department of the Interior, and that the Secretary of the Interior is the person invested with the execution and administration of such laws as the plaintiff, through its Congress, has enacted from time to time for the care, management, and control of the property of its wards aforesaid; and that in the administration of these laws the Secretary of the Interior is aided by subordinate officers and employes under appropriate rules and regulations.

II.

That in the execution of the trust aforesaid large sums of money, of which the sums hereinafter mentioned were a part, principally accruing from royalties and bonuses received on account of oil and gas mining leases, made with the approval of the Secretary of the Interior, of lands alloted to said incompetent and restricted Indians who are enrolled members of the Five Civilized Tribes residing in Oklahoma, have come into the custody and control of the Secretary of the Interior, the same having been paid by the lessees and debtors of said Indians, under the rules and regulations provided by him, into the office of the superintendent of the Five Civilized Tribes at Muskogee, Oklahoma.

III.

That by an act of Congress approved May 25th, 1918 (ch. 86, 40 Stat. 561, 592), it was provided that the funds of the Five Civilized Tribes, and of the individual members thereof, held in trust by the Secretary of the Interior, "shall be deposited in the banks of Oklahoma or in the United States

Treasury and may be secured by the deposit of United States bonds."

IV.

That on October 26th, 1921, and for several years prior thereto, there was situated at Guthrie, Oklahoma, a banking institution incorporated under the laws of that State, engaged in the general banking business under the name of Oklahoma State Bank.

V.

That on or about March 8, 1921, the Secretary of the Interior, through his agent and under regulations by him prescribed and pursuant to the authority of the act of May 25th, 1918, *supra*, caused to be deposited in that bank certain sums of money which had been paid into the office of the superintendent of the Five Civilized Tribes on account of certain individual members and allottees of the Five Civilized Tribes who were incompetent and restricted, and which, under the law and regulations, were held in trust by the Secretary of the Interior as the agent of the plaintiff and in the discharge of his duties as guardian of such Indians, and were collected and deposited, under the rules and regulations approved by the Secretary in the name of the cashier and special disbursing agent for the Five Civilized Tribes, on time deposit, bearing interest at the rate of 4 3-4 per cent per annum, subject to withdrawal by him from time to time as the individual needs of any of said wards required for their benefit; and that on October 26th, 1921, the sum so deposited amounted to not less than $42,000.

VI.

That on February 10, 1921, and before the deposit aforesaid was made, the Secretary of the Interior required and the Oklahoma State Bank delivered to the United States of America a bond with

the Fidelity and Casualty Company of New York as surety, to secure the payment of said funds, which bond was on October 26, 1921, and still is, in full force and effect, the same having been given according to regulations prescribed by the Secretary of the Interior.

VII.

That on October 7, 1921, a bank examiner of the State of Oklahoma, in the discharge of his duties, made an investigation of the Oklahoma State Bank and found that it was insolvent and unable to pay its debts and unable to continue as a going banking concern; and accordingly he reported such facts to the bank commissioner of the State of Oklahoma, who, pursuant to the authority vested in him by the laws of that State, on October 26, 1921, adjudged the bank insolvent and thereupon took charge and possession, and still has charge and possession, of its assets, books, and records for the purpose of liquidation, and said bank on the date last mentioned was and still is insolvent.

VIII.

That on October 26, 1921, there was, and still is, due to the plaintiff from the Oklahoma State Bank the sum of $42,000, being the amount deposited with it as aforesaid, with interest from that date to the present time at the rate hereinbefore mentioned, none of which has been paid.

IX.

That section 3466 of the Revised Statutes of the United States provides:

> 'Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first sat-

isfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effect of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.'

X.

That the assets of the Oklahoma State Bank now in the possession of the bank commissioner of that State are in excess of the plaintiff's claim of $42,000 and interest thereon as aforesaid, and the plaintiff is entitled to have its debts first satisfied and paid in full out of those assets before other creditors are paid anything.

XI.

That the plaintiff has demanded of the bank commissioner the payment of the said $42,000, with interest thereon from October 26, 1921, at the rate mentioned, out of the assets of the Oklahoma State Bank prior to the discharge of any other of its liabilities, but this demand has been refused by him on the ground that the State of Oklahoma, under its laws and especially under section 303, Revised Laws of Oklahoma of 1910, has a first lien upon the assets of the bank for the benefit of the depositors' guaranty fund, for the purpose of paying the bank's unsecured depositors and creditors; and upon the further ground that the plaintiff deposited the said sum with full knowledge of the statutory law of the State of Oklahoma which provides for and creates a lien for the benefit of unsecured depositors and creditors; that the plaintiff is therefore not entitled to have its debt paid until the lien of the State of Oklahoma for the benefit of unsecured depositors has been satisfied; that section 3466 of the Revised Statutes of the United States has no application

in the administration of the assets of insolvent banks in the State of Oklahoma; and that when the plaintiff made the deposit in the Oklahoma State Bank it thereby consented to the method of administration, in the event of insolvency, prescribed by the statutes of Oklahoma; and that the act of making the deposit constituted a waiver of the rights of the plaintiff under said section 3466.

XII.

That a controversy has therefore arisen between the United States of America and the State of Oklahoma as to priority of rights in the payment of debts due them from said bank; that the claim of the plaintiff is predicated upon section 3466 of the Revised Statutes, while the claim of the defendant is predicated upon the laws of the defendant State. The plaintiff avers that the priority accruing to it under the Revised Statutes aforesaid is superior to the assumed rights of the State of Oklahoma under the laws of that State; that the plaintiff in making the deposit of funds in said bank, as hereinbefore set forth, has not, by virtue of the statutory laws of Oklahoma under which the State is given a first and prior lien on all the assets of an insolvent bank in that State for the payment of unsecured creditors, waived or forfeited any of its rights or priorities given to it under the Revised Statutes of the United States.

Wherefore, the plaintiff prays that the defendant and its bank commissioner be perpetually enjoined from paying out or distributing any of the assets of the Oklahoma State Bank now in the possession or hereafter coming in the possession of the defendant through its bank commissioner, until the bank commissioner has fully paid the debt due to the United States on account of the aforesaid deposit; and that the defendant, through its bank commissioner, be required to pay the debt due the plaintiff, before paying out or making distribution of any

of the assets of said bank in the possession of the State, by reason of the administration of the affairs of that bank under the law of the defendant State, to any other person; and that the plaintiff may have such other and further relief to which in equity and good conscience it may be entitled.

(Signed) HARRY M. DAUGHERTY,
Attorney General.
JAMES M. BECK,
Solicitor General.

To this bill of complaint, the state of Oklahoma have filed their motion to dismiss, which is as follows:

Comes now the State of Oklahoma, by its Attorney General and moves the Court to dismiss the Bill of Complaint herein for the reason and on the ground that the allegations of said bill of complaint do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant or to entitle the plaintiff to the relief prayed for, in this, to-wit:

A.

That Section 3466 of the Revised Statutes of the United States plead and relied upon by plaintiff herein are inapplicable and uninforceable against the State of Oklahoma, in its administration of the liquidation of the Oklahoma State Bank of Guthrie, Oklahoma.

B.

That the defendant, The State of Oklahoma, under the laws of Oklahoma as plead in the Bill of Complaint, has a lien on all of the assets of said Oklahoma State Bank of Guthrie, Oklahoma, for the reimbursement of the defendant by reason of the payment by it of the unsecured depositors of said bank, and that the alleged rights of the United States of America are inapplicable and unenforceable against the State of Oklahoma until the obligations

for which said lien is given is fully paid and satisfied.

C.

That said Section 3466 of the Revised Statutes of the United States is invalid in so far as the same asserts priority in payment of a debt due the United States in opposition to the payment of a debt due the State of Oklahoma.

Wherefore, The State of Oklahoma moves this Court to dismiss the Bill of Complaint herein and that defendant have its costs herein.

(Signed) GEORGE F. SHORT,
Attorney General.
WILLIAM H. ZWICK,
Assistant to the Attorney General.
Counsel for Defendant.

The Bill of Complaint and the Motion to Dismiss the same, calls for a judicial construction of Section 3466, 3467 and 3468 of the Revised Statutes of the United States. Section 3466 of the Revised Statutes of the United States, is as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467 of the Revised Statutes of the United States is as follows:

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Section 3468 of the Revised Statutes of the United States is as follows:

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

The priority or preference rights claimed by the United States of America, is derived from certain Acts of Congress, the first of which is contained in the Act of July 31, 1789, Section 21, 1st Statutes at Large, 42, which provides:

"And be it further enacted, that where any bond for the payment of the duties shall not be satisfied on the day it became due, the collector shall prosecute for the recovery of the money due thereon, by action or suit at law, in the proper court, having cognizance therein; and in all cases of insolvency, or where any estate in the hands of executors or

administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bonds shall be first satisfied."

This Act was amended by the Act of August 4th, 1790, First Statutes at Large, 169, and is as follows:

"And be it further enacted, that where any bond for the payment of duties shall not be satisfied on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, on any such bond, shall be first satisfied."

The Act was again amended by the Act of May 2nd, 1792 being Section 18, First Statute at Large, 263, which Section is as follows:

"And be it enacted and declared, That if the principal, in any bond which shall be given to the United States, for duties on goods, ware, and merchandise imported, shall be insolvent, or if such principal being dead, his or her estate and effects, which shall have come to the hands of his or her executors or administrators, shall be insufficient for the payment of his or her debts, and if, in either of the said cases, any surety in the said bond, or the executors and administrators of such surety, shall pay to the United States the moneys thereupon due, such surety, his or her executors or administrators, shall have and enjoy the like advantage, priority and preference, for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States, by the forty-fourth section of the act, entitled "An act to provide more effectually for the

collection of duties imposed by law on goods, wares, and merchandise imported into the United States, and on the tonnage of ships or vessels," and shall and may bring and maintain a suit upon the said bond, in law or equity, in his, her or their own name or names, for the recovery of the moneys which shall have been paid thereupon. And it is further declared, That the cases of insolvency in the said forty-fourth section mentioned, shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor shall have been attached by process of law, as to cases, in which an act of legal bankruptcy shall have been committed."

This Act was again amended by the Act of March 3rd, 1797, as found in Section 5, First Statutes at Large, 515, which is as follows:

"And be it further enacted, That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The last Act, prior to the Revised Statutes of the United States, is the Act of March 2nd, 1799, being Section 65, First Statutes at Large, 676, which is as follows:

"And be it further enacted, That where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith and without delay, cause a prosecution to be commenced for the recovery of the money thereon by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof; Provided, that in all cases in which suits or prosecutions shall be commenced for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, the person or persons against whom process may be issued shall and may be held to special bail, subject to the rules and regulations which prevail in civil suits in which special bail is required: And provided also, that if the principal in any bond, which shall be given to the United States for duties on goods, wares or merchandise imported, or other penalty, either by himself, his factor, agent, or other person for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators or assignees, shall be insufficient for the payment of his or her debts, and if in either of the

said cases, any surety on the said bond or bonds, or the executors, administrators or assignees of such surety shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees, shall have and enjoy the like advantage, priority or preference for the recovery and receipt of the said moneys out of the estate and effects of such insolvent, or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits upon the said bond or bonds in law or equity, in his, her, or their own name or names, for the recovery of all moneys paid thereon. And the cases of insolvency mentioned in this section, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed. And where suit shall be instituted on any bond for the recovery of duties due to the United States, it shall be the duty of the court, where the same may be pending, to grant judgment at the return term, upon motion, unless the defendant shall, in open court, the United States attorney being present, make oath or affirmation that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district, prior to the commencement of the return term aforesaid: whereupon, if the court be satisfied, that a continuance until the next succeeding term, is necessary for the attainment of justice, and not otherwise, a continuance may be granted until next succeeding term and no longer. And on all bonds upon which suits shall be commenced, an interest shall be allowed at the rate of six per cent per annum, from

the time when said bonds become due, until the payment thereof."

It is this latter Act which is now Section 3466, Revised Statutes of the United States, upon which the complainant claims the United States of America are entitled to a priority or preference in payment of its deposit in the Oklahoma State Bank of Guthrie, Oklahoma, now insolvent.

Statement of Facts.

The Oklahoma State Bank of Guthrie, Oklahoma, was, prior to October 26th, 1921, a banking institution organized under the laws of Oklahoma, and was engaged in the banking business at Guthrie, Oklahoma; that on said date the bank commissioner of Oklahoma, having examined into the assets and liabilities of said bank, found and so declared said bank to be in an insolvent condition, and he thereupon, and under the laws of the defendant state, took charge and possession of the records, books and assets of said bank, and proceeded to liquidate the same, as provided by law; that pursuant to the laws of Oklahoma, the bank commissioner finding the assets of said bank wholly insufficient to pay the depository liabilities of the bank, was compelled to, and did, pay to the unsecured depositors out of the Depositors' Guaranty Fund of the State of Oklahoma, the sum of $285,000.00 and in addition thereto, issued to the unsecured depositors of said bank, as provided by the laws of Oklahoma, Guaranty Fund Warrants, in the sum of $304,058.85; that out of the assets of said bank so taken over by the bank commissioner, he has not realized therefrom a sum sufficient to reimburse the defendant state for said payments made to the unsecured depositors of said bank, and that under Section 303 of the Revised

Laws of Oklahoma, 1910, the defendant is given a first lien upon the assets of said insolvent bank to indemnify it for the payments so made.

That the United States of America acting by, and through its Secretary of the Interior, and pursuant to Chapter 86, 40 Statute, 592, under rules and regulations promulgated by the Department of the Interior made a deposit of money in said Oklahoma State Bank, and that on the date of taking over of said bank by the bank commissioner of the State of Oklahoma, there remained the sum of $42,000.00 in said bank, credited upon the books thereof, to D. Buddras, cashier; that prior to the deposit of said moneys so made, the United States of America required, and the Oklahoma State Bank, executed a certain bond wherein the Oklahoma State Bank was principal, and the Fidelity and Casualty Company of New York, was surety, and the United States of America was obligee, in the principal sum of $52,000.00, and that said bond on the 26th day of October, 1922, was in full force and effect, and that the surety thereon is wholly solvent and stands ready and is able and willing to pay to the United States of America, the said deposit of $42,000.00, together with interest thereon, as provided in said bond upon the demand or request of the United States. That under the rules and regulations of the Department of the Interior, promulgated and approved October 15th, 1915, it is provided that the deposits of moneys belonging to any of the Five Civilized Tribes, shall be deposited by the Secretary of the Interior, only upon the receipt and approval of satisfactory bond or bonds in amounts equal to the maximum sum to be deposited, plus ten per cent to be approved both as to form and as to responsibility of surety by the said Secretary of the Interior, and that it was under said Act of Congress and said

rules and regulations of the Department of the Interior, that the said deposits were made in said bank, and the said surety bond executed by said bank and accepted by the Secretary of the Interior.

Argument and Authorities.

The State of Oklahoma by its motion to dismiss, takes the position that under the allegations of the bill of complaint, that its motion to dismiss must be sustained on the ground that Section 3466 of the Revised Statutes of the United States, does not give the complainant the priority or preference right to the payment of the debt due it. This for the reason that the United States of America cannot sustain its contention to have a debt due it paid prior to the payment to other creditors upon any claim or right of sovereignty, but that the sole grounds upon which it can sustain its claim must be by virtue of the act of Congress plead in its Bill of Complaint.

An analysis of the Act demonstrates that the Congress have made a legislative interpretation of the Acts of Insolvency referred to, therein, and have declared that the priority right of the United States only applies in the class of cases referred to in the act, namely:

A.

Where an insolvent debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof.

B.

Or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law.

C.

As to cases in which an Act of bankruptcy is committed.

Unless the taking over the bank by the bank commissioner of Oklahoma, an executive officer of the State of Oklahoma, acting under the laws thereof, can be construed to bring such Act within one of the three designated Acts of Insolvency, then it is urged the Act cannot be applied. The Oklahoma State Bank, when it became financially embarrassed, did not make a voluntary assignment of its property and effects for the benefit of all of its creditors—on the contrary, the State of Oklahoma under its police power, and acting through its constitutional officers, and without the consent of the bank, took possession of its property for the purpose of its liquidation under the laws of Oklahoma. This Act cannot be construed to be a voluntary assignment, nor even an involuntary assignment.

It is not alleged in the Bill of Complaint, that such a voluntary assignment was made, and in the absence of such allegation the priority or preference right of the United States cannot be sustained. It is not alleged, nor will it be urged, that the estate and effects of said bank have been attached by a process of law, on the ground that the bank's officers have absconded, concealed or absented themselves from the place of business of said bank. Neither is it alleged in the Bill of Complaint, that the bank has or could have committed an Act of Bankruptcy. The mere insolvency of the bank is not sufficient to invoke the benefits of the Act of Congress, but the complainant must affirmatively allege that the bank being insolvent has brought itself, by its own act, within one of the provisions of the Act. These views are fully sustained by the decisions of this court.

As early as 1838, this court, in the case of *George Beaston, Garnishee of the Elkton Bank of Maryland*, vs. *The Farmers Bank of Deleware*, 12 Peters, page 102, 9 L. Ed. page 1017, has so construed the act in that case. The facts were these: An attachment at the suit of the Farmers Bank of Deleware was issued against the effects of the Elkton Bank on the 24th of September, 1830, and under it were attached the funds of the Elkton Bank in the hands of George Beaston, its debtor. On the 8th day of July, 1831, an attachment was issued at the suit of the United States, the United States being creditors of the Elkton Bank, and it was laid on the same funds which had been previously attached at the suit of the Farmers Bank of Deleware. It was there held:

> "The money thus attached by the Farmers Bank of Deleware, in the hands of George Beaston, a debtor to the Elkton Bank, by legal process, before the issuing of the attachment in behalf of the United States, was bound for the debt for which it was first legally attached, by a writ, which is in the nature of an execution; and the right of a private creditor thus acquired, could not be defeated by the process subsequently issued at the suit of the United States."

The United States claimed that the funds of the Elkton Bank, in the hands of George Beaston, should by virtue of Section 3466 of the Revised Statutes of the United States be subjected to the payment of its debt, in preference to the rights of the Farmers Bank of Deleware, notwithstanding the latter bank had prior to the attachment of the United States laid an attachment against the same fund by legal process.

It was urged by counsel for Beaston:

A. That by a proper construction of that Act, he having paid to the United States the amount which he owed to the Elkton Bank, is not liable to the Farmers Bank of Deleware.

B. That the appointment of receivers by the Circuit Court with power to take possession of the property of the Elkton Bank, and to sell and dispose of the same, and to collect all debts due it, was such an assignment of its property as to give the right of priority to the United States.

C. That the election of trustees by the stockholders of the bank, under the Act of Maryland Legislature, was also such an assignment of the property of the bank as to give the right of priority to the United States.

Counsel for the Farmers Bank of Deleware resisted all the grounds assumed by counsel for Beaston and insisted that by a fair construction of the 5th Section of the Act, and the former adjudications of this court, the priority therein provided for would not attach to the fund belonging to the Elkton Bank, in the hands of Beaston.

This Court, in construing the Act of Congress in its opinion delivered by Mr. Justice M'Kinley, says:

> "From the language employed in this Section, and the construction given to it from time to time by this court, these rules are clearly established:
>
> "1st. That no lien is created by statute;
>
> "2nd. The priority established can never attach while the debtor continues the owner and in possession of the property although he may be unable to pay all his debts;
>
> "3rd. No evidence can be received of the insolvency of the debtor until he has been divested of his property *in one of the modes stated in the Section;* and

> "4th. Whenever he is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first, out of the debtor's property."

After the United States had obtained its judgment against the Elkton Bank of Maryland, and had issued an execution thereon, and the same was returned *nulla bona*, it filed a bill in equity for the appointment of receivers, with authority to take possession of the property of said bank and dispose of the same, and to collect all debts due it, and under this application an order was made, appointing receivers who thereupon gave bond and proceeded to execute their trust.

It was contended by the United States that the appointment of the receivers to take charge of the insolvent Elkton Bank of Maryland, such appointment and action thereunder, had the legal effect of an assignment of the bank's property, as would bring in play the act of Congress. This contention of the United States was not sustained, this court holding:

> "If the District Court of the United States has a right to appoint receivers of the property of an insolvent bank which is indebted to the United States, for the purpose of having the property of the bank collected and paid over to satisfy the debt due to the United States by the bank, this would not be a transfer and possession of the proprety of the bank within the meaning of the Act of Congress, and the right of the United States to a priority of payment would not have attached to the funds of the bank."

The Elkton Bank of Maryland in this case, under the agreed statement of facts was insolvent and was unable to pay its debts. While in this condition, its

acting president and directors applied to the Legislature of Maryland for a bill authorizing them and the bank's stockholders to select trustees for the purpose of liquidating the affairs of the bank.

The Legislature of Maryland as requested at its December session in 1829, passed an Act, Chapter 170, authorizing the bank to select trustees with authority to take charge of all of the bank's assets and liquidate its indebtedness. Under the Act of the Legislature of Maryland, certain trustees were selected by the bank who refused to act. It was contended also by the United States that the selection of the trustees under the Legislative Act was such a transfer of the bank's property which would give the United States priority in payment of its debt out of the assets of said bank, in the hands of the trustees. In answer to this contention of counsel, this court holds:

> "The Legislature of Maryland passed an act authorizing the stockholders of the Elkton Bank to elect trustees who were to take possession of the funds and property of the bank for the purpose of discharging the debts of the bank and distributing the residue of the funds which might be collected by them, among the stockholders. This, had the law been carried into effect, was not such an assignment of all of the property of the bank as would entitle the United States to a priority of payment, out of the funds of the bank."

This case conclusively establishes that banks may be wholly insolvent, and, therefore, no longer be permitted to exercise their franchises, and yet not bring them within the terms of the Act of Congress here relied on, for the reason that the taking possession of the banks property by the State of Oklahoma

through its bank commissioner would not be such a transfer and possession of the property of the Oklahoma State Bank within the meaning of the Act of Congress, and, therefore, the priority claimed by the United States would not attach against its funds or assets.

It is provided by Section 302 of the Revised Laws of Oklahoma, 1910, under what conditions the bank commissioner may wind up the affairs of a state bank in Oklahoma. This Act provides:

> "Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

It will be observed that a bank may be taken charge of by the bank commissioner under three conditions:

1st. That it voluntarily place itself in the hands of the commissioner.

2nd. When a court of competent jurisdiction shall adjudge it to be insolvent, or its rights or franchises to conduct a banking business shall have been adjudged forfeited, and

3rd. Whenever the bank commissioner shall be-

come satisfied of its insolvency, he may take possession thereof, and wind up its affairs.

As the Act of the Legislature of Maryland, authorizing the appointment of trustees to liquidate the bank of Elkton, was held not to be such a transfer of the bank's property as would bring it within the terms of the Act of Congress, so the Legislative Act of the State of Oklahoma, under which this insolvent bank was taken over by its bank commissioner cannot be construed to give the United States the priority or preference rights contended for.

In the citation of authorities, reference is frequently made to Section 5 of the Act of March 3rd, 1797, Chapter 74. This Act in every essential feature is identical with Section 65 of the Act of March 2nd, 1799, which is now Section 3466 of the Revised Statutes of the United States.

In 1814, this Court in the case of *Prince* v. *Bartlett*, reported in the 8th Cranch, 431, 3rd L. Ed. 614, construed the act of Congress in question. The facts in this case were: In June, 1810, certain merchandise, property of Wellman and Ropes, were attached by the Sheriff under writs of attachment issued by a creditor of Wellman and Ropes. On the 18th of September, 1810, an execution was issued on a judgment recovered by the United States against Wellman and Ropes, and on the following day attachments in favor of the United States were issued directed to the marshal to levy upon the goods previously attached by the sheriff. Under this latter attachment, the marshal forcibly broke into the building containing the merchandise which had been attached by the Sheriff, took possession thereof, and disposed of it in satisfaction of his judgments. The debtors, Wellman and Ropes, continued in business until the 4th day of

June, and then failed, and then were and ever since have continued to be, debtors, unable to pay their debts. Wellman continued at his usual place of abode ever since his failure, and did not for any whole day confine himself within his house, but sometimes kept his person within doors, and his doors fastened, and occasionally used other vigilance and caution to avoid arrest of his person for two or three weeks following the said fourth of June, but was never arrested by any officer or pursued for that purpose. Ropes always continued at large in Salem, and has never confined or concealed himself from his creditors at any time.

In an action of trover, commenced by the Sheriff against the marshal, judgment was rendered for the defendant. On appeal it was decided that the several matters produced and proved on the part of the defendant were not upon the whole case sufficient to maintain the issue on the part of the defendant, and to bar the plaintiff of his action. The cause was then removed by writ of error to this court. The sole question for consideration of this court, is whether the priority to which the United States is entitled by law, attaches in this case. In the opinion delivered by Judge Duvall, this Court held:

> "This priority is given by the 5th section of the act of the 3d of March, 1797, chap. 74. It is also given by the 65th section of the collection law in the words following: 'and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied.' In the same section the legislature explain their meaning of insolvency by declaring that it shall be deemed to extend as well to cases in which a debtor, not having sufficient prop-

erty to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

"It is admitted that the property seized by the attachments and executions before stated was insufficient to satisfy the several claims exhibited, and that Wellman and Ropes were unable to pay their debts, but it does not appear that their property was attached as the effects of absconding, concealed or absent debtors; nor does it appear, or is it even alleged that they or either of them have made a voluntary assignment of their property for the benefit of their creditors; nor is it alleged that either of them has committed an act of legal bankruptcy. It appears to be the true construction of the act to confine it to the cases of insolvency specified by the legislature. Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law, not a vague allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors it would be difficult to ascertain.

"The property in question being in the possession of the sheriff by virtue of legal process, before the issuing the writ on behalf of the United States, was bound to satisfy the debts for which it was taken; and the rights of the individual creditors thus acquired could not be defeated by the process on the part of the United States subsequently issued."

We challenge the Court's attention that in the *Beaston* v. *Farmers Bank of Delaware* case, (*supra*) that the case was decided upon the point that there was no voluntary assignment of all of the Elkton Bank's property, for the benfit of its creditors, as provided by one of the methods in the Act of Congress, and, therefore, the Act

of Congress was inapplicable and unenforceable in that case.

So, in the case of *Prince* v. *Bartlett*, (*supra*) the claim of priority of the United States was not sustained on the specific ground that the debtors, Wellman and Ropes, although largely indebted to the United States, and being insolvent and unable to pay their debts, had not been brought within the terms of the Act, in that their goods and effects had not been attached by process of law, on the ground that they were absconding, concealed or absent debtors.

It will be noticed that in the latter case, the finding of fact was that Wellman had continued at his usual place of abode in Salem ever since his failure, and had not for any whole day confined himself within his house, but has sometimes kept his person within doors, and had his doors fastened, and occasionally used other vigilance and caution to avoid arrest of his person for two or three weeks next following the date of his failure. Had it been found as a matter of fact, that the debtors, Wellman and Ropes, had within the purview of the Act of Congress, absconded, concealed or absented themselves, then the attachment laid upon their goods, could have been sustained under the Act.

It was held in this case, that the Legislature explained their meaning of insolvency by declaring that it shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors, or in which the estate and effects of absconding, concealed or absent debtors shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.

Chief Justice Marshall, in 1804, in the case of the *United States* v. *Fisher et al.*, reported in 2nd Cranch, 358; 2nd. L. Ed. 304, rendered the opinion of this Court, construing the Acts of Congress here relied on. It is there said:

> "On this subject, it is to be remarked that no lien is created by this law; no bona fide transfer of property in the ordinary course of business is overreached. It is only a priority of payment, which, under different modifications, is a regulation in common use; and this priority is limited to a principal state of things when a debtor is living; although it takes effect generally if he be dead."

And again it is said:

> "On the 2nd day of May, 1792, Volume 2, page 78, the priority previously given to the United States is transferred to the surety on duty bonds, who shall themselves pay the debt; and the cases of insolvency, in which this priority is to take place, are explained to comprehend the case of a voluntary assignment, and the attached effects of an absconding, concealed or absent debtor."

A year later, Marshall again writes the opinion of this Court, in the case of the *United States* v. *Hooe*, 3rd Cranch, 73, 2nd L. Ed., 370. In construing the Act of Congress, it is there held:

> "The words of the Act extend the meaning of the word 'Insolvency' to cases where a debtor not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors. The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property,' as used, and can only be satisfied by an assignment of all the property of the debtor."

Had the Legislature contemplated a partial assignment,

the words "or part thereof" or others of a similar import, would have been added.

It the case of *United States* v. *Fisher*, (*supra*) it was held that the United States were entitled to the priority of payment out of the effects of the bankrupt, in the hands of the assignee.

The first Bankruptcy law in the United States, was passed in 1800. Marshall then in Congress, was the author of this Legislation. This Act remained in force until December 19th, 1803, at which time it was repealed.

The decision of the Court in the *United States* v. *Fisher*, (*supra*) was based specifically upon the ground that the attachment was laid by the United States on the property of the bankrupt, in the hands of the collector of Newport in Rhode Island, *after the commission of bankruptcy had issued*.

So, in this case, the decision was based upon the third provision of the Act of Congress, that the priority of the United States extends "to cases in which an Act of Bankruptcy is committed." When the term "act of bankruptcy" was used, Congress had in mind the meaning of the term as used in the old English sense.

Marshall so held in the case of *Sturges* v. *Crowinshield*, 4th Wheat. 122; 4th L. Ed. 529. The Act of Congress becomes applicable only where an "Act of Bankruptcy" is committed. There is a distinction between laws of Insolvency and Bankruptcy. One may be insolvent and unable, in the ordinary course of business to pay his debts, but unless some Act of Bankruptcy is committed by the debtor of the United States, their priority cannot attach.

In the earliest Act of Bankruptcy, Statutes 34 and 35, (year 1542-3), Henry VIII, Chapter 4, it will be found

that an overt act accompanied by some wrong intent must be committed by the insolvent to make him a bankrupt. The language provides:

> "Divers and sundry persons craftily obtaining into their hands great substances of other mens goods, do suddenly flee to parts unknown, or keep to their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substances obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience."

The first Bankruptcy Act of the United States, passed in 1800, follows in its general features, and even in its wording, the English Bankruptcy laws, and was essentially a law against debtors framed along the line of suppressing fraudulent and criminal practices, rather than along the lines of providing a general system for the rational administration of insolvent estates, no provision at all being made for one voluntarily to become a bankrupt, the distinguishing feature of the later bankruptcy laws, without which a bankruptcy law cannot be said to have arrived at the full statute of a general system of administering insolvent estates, which it is at present.

It was the English Acts of bankruptcy of Henry VIII, (supra) and its numerous amendments, that Congress had in mind when it passed the priority or preference statute, under which the Act was made to apply in cases in which "an Act of Bankruptcy" is committed.

In *United States* v. *Fisher*, (*supra*) the Act of Bankruptcy having been committed, and a commission of Bankruptcy having issued, it was determined that the United States were entitled to be paid first out of the assets of the insolvent estate, in the hands of his assignees.

The distinction between "Insolvency" and "Bankruptcy" is defined in Ballentines Law Dictionary, where these definitions may be found:

> "An Act of Bankruptcy—An Act by the doing of which a debtor may be declared a bankrupt.
>
> "Insolvency—Inability to pay debts as they become due in the ordinary course of business."

So in Second Blackstone's Commentaries, 471,

> "Act of Bankruptcy—An Act which subjects a person to be proceeded against as a bankrupt."
>
> "Bankruptcy: Originally and strictly a trader who secretes himself, or does certain other acts intending to defraud his creditors."

So in Jacobs Law Dictionary, printed in England in 1744:

> "By a bankrupt with us signifieth generally, man or woman that living by buying and selling, hath gotten other men's goods with his or her hands, and hideth himself in places unknown or in his own house in order to deceive or defraud his creditors." Inst. 4, 277:
>
> "A banker who hath many peoples' money in his hands, refuses payment yet keeps his shop open, and as often as he is arrested gives bail; by this means he may give preference of payment to his friends; and if when he hath done, he runs away, such payment shall stand against a commission of bankruptcy."

And so in 1778, Sir William Blackstone, in the eighth addition of his Commentaries on the laws of England, Chapter 31, 477, says:

> "To learn what the particular acts of bankruptcy are which render a man bankrupt, we must consult the several statutes and the resolutions formed by the Courts thereon."

He then enumerates many acts which constitute an act of bankruptcy such as:

1st. Departing from the realm.

2nd. Departing from his house with intent to avoid his creditors.

3rd. Keeping his own house with the same intention.

4th. Procuring his arrest.

5th. Procuring his goods to be attached by process of law.

6th. Making fraudulent conveyances of his property.

7th. Eluding the justice of the law.

8th. Compelling creditors to take less than due them.

9th. Lying in prison without giving bail.

10th. Escaping from prison after arrested.

11th. Neglecting to make satisfaction of a just debt within two months after legal service.

As the bankruptcy laws of England were founded upon the theory that the insolvent debtor must commit some overt act with a fraudulent intent against his creditors, so was the term used in the Act of Congress under discussion. We submit that no Act of the bank in the instant case, brings it within the purview of this law.

In the year 1817, in an opinion delivered by Washington, J., *Thelusson et al.*, vs. *Smith*, 2nd Wheat. 396; 4th L. Ed. 271, this court was again called upon to construe this Act of Congress. The facts in this case were that Thelusson, in May, 1805, obtained a judgment against one William Crammond. Exceptions were filed and overruled, and a judgment was finally entered on the 15th of May, 1806. On the 22nd of May, 1805, Cram-

mond executed a conveyance of all of his estate to trustees for the payment of his debts, at which time he was indebted to the United States on several duty bonds which became due at different periods subsequent to the 22nd day of May, 1805. The Government obtained judgment against Crammond upon these duty bonds, and a portion of his landed estate was levied upon and sold to apply on the judgment. Controversy arose as to whether the judgment obtained by Thelusson, being in point of the priority to the conveyance of his estate to trustees for the benefit of his creditors should be satisfied out of Crammond's estate prior to the claims of the United States, under the Act of Congress of March 2nd, 1797. It was stipulated by the parties in writing, that on the 22nd day of May, 1805, Mr. Crammond was unable to satisfy all his debts, and that this fact should be considered as part of the special verdict. It was further in evidence that the assignment made by Crammond on the 22nd day of May, 1805, was a voluntary assignment of all his estate for the benefit of all his creditors. The Circuit Court gave judgment against the plaintiff below, and the cause was brought by Writ of Error to this Court.

The question for the court's consideration was, "When does a judgment nisi have the effect of creating a lien on the debtors property?"

If from the time when the judgment nisi is entered; then whether in this case the United States are entitled to be paid in preference to the judgment creditor.

Speaking for this Court, Washington, J., says:

"In considering this question, it will be assumed for the sake of argument that the judgment nisi binds the real estate of the debtor from the time it is rendered. This question did not arise in the case of the United States vs. Fisher et al., or in that

of the United States vs. Hooe, et al. The point decided in those cases was that a mere state of insolvency or inability of a debtor to the United States, to pay all his debts, gives no right of preference to the United States, unless it is accompanied by a voluntary assignment of all the property for the benefit of his creditors."

"In this case, the conveyance of Crammond, on the 22nd day of May, 1805, was all of his property; at which time he was unable to pay all his debts; it is, therefore, a case precisely within the law, and within the principle decided by the above cases."

The reason for the holding of this court, in this case, that the United States were entitled to a priority in payment of the debt due them, out of Crammond's estate, was specifically based upon the fact in that record, that he, the debtor, had made a voluntary assignment of his property for the benefit of all his creditors.

Under the law of Pennsylvania, the judgment obtained by Thelusson had not ripened into a lien upon the estate of Crammond, for the reason that under the law of Pennsylvania, a lien is only perfected under a judgment when an execution is levied thereon. Had this execution actually issued, prior to the general assignment made by Crammond, the priority rights of the United States would not have been sustained. It is said in the opinion:

"If there, therefore, before the right of preference has accrued, to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi fa., the property is divested out of the debtor and cannot be made liable to the United States."

The earliest case to which our attention has been called, which gives a judicial construction of this Act

of Congress, is case 15,536, *United States* vs. *King*, 26 Federal case, page 788. The facts were these: The United States had obtained judgments against the partnership of Johnson and Daniel King on certain Custom House Bonds, and issued executions which were levied on a cargo of wines from Cadiz, in the hands of the defendant, (James King). He claimed these wines under an assignment and bill of sale from the house of Johnson and Company, antecedent to the judgments. The question was, whether, under certain Acts of Congress, the execution should have priority of the assignments; it being pointed out that if they had, the defendant would pay the amount from the proceeds in his hands. On the trial, which was long, the following points arose and were ruled by the courts unanimously:

> "We are clearly of opinion, that it is not every case of actual insolvency which is within the words or intent of the Acts of Congress. Traders in business and continuing so may be really insolvent; they may be so unknown to themselves, and frequently unknown to mankind. It would be productive of the greatest injustice, and serve to embarrass and check mercantile transactions, if the right of a creditor to retain his payment, or transfer of property in payment, as against Custom House Bonds, was to depend upon future scrutiny on the part of the United States into the actual condition of the debtor's affairs, at the time of the payment, sale or assignment; it would lead to inextricable difficulties. Our opinion is that the Act of the 2nd of March, 1799, in its terms and meaning, only gives a preference as against other creditors on Custom House Bonds, after a notorious Act of Insolvency; as where the debtor has assigned, for the benefit of his creditors; where he has absconded and his property is attached, etc. In the case before us, although when the assignment was made, it is probable the House was really insolvent, yet no Act of Bankruptcy had been com-

> mitted; no assignment made to any one creditor of all the effects; no attachment had issued; no transfer made to assignees for the benefit of all or any particular creditor. This, therefore, is not a case of insolvency within the Acts of Congress, under which the United States claim a preference, so as to avoid the assignment made to the defendant."

In the case of *John Conard, Marshal of the Eastern District of Pennsylvania, plaintiff in error*, vs. *Francis H. Nicholl*, 4th Peters, 291, 7th L. Ed., 862, this Act of Congress was again drawn in question. Washington, J., who had delivered the opinion of this Court in *Thelusson* vs. *Smith*, (*supra*), tried the *Conard* vs. *Nicholl* case in the Circuit Court, and his charge to the jury is reported in full in this case. To demonstrate that the Court conceived it to be the law that before the United States would be entitled to a priority in payment of its debt out of the insolvent debtor's estate, that there must be an assignment of the whole of the property of the debtor, we respectfully call the Court's attention to Washington's charge in the Circuit Court. The charge is:

> "I take the rule as now well settled by the Supreme Court, to be that the preference of the United States does not extend to cases where the debtor has not made an assignment of the whole of his property. If the assignment leaves out a trifle, or part of his property for the purpose of evading the Act giving the preference, it will be considered as a fraud upon the law and the Court will treat it as a total divestment."

Justice Baldwin, in delivering the opinion of the Court, says this case has been submitted without argument. It is in all leading features, both in points of law, which arose, and evidence given at the trial, so similar to the case of *Conard* vs. *the Atlantic Insurance Company*, decided by this Court at the January term, 1828,

1st Peters, 386, that we do not think it necessary to enter into any examination of the principles upon which the judge submitted the case to the jury. They appear to us to be in perfect accordance with the opinion delivered in that case on great deliberation; of the entire correctness of which we do not entertain a doubt.

Judge Washington also gave his charge to the jury in the Circuit Court in the case of *John Conard* vs. *the Atlantic Insurance Company of New York*, 1st Peters 386, 7th L. Ed., 189, and Mr. Justice Story delivered the opinion of this Court therein. The case was this: An action of trespass de bonis asportatis, brought in the Circuit Court of the district of Pennsylvania by the Atlantic Insurance Company to recover against the defendant, John Conard, the marshal of that district, the value of certain teas shipped on the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States, against one Edward Thomson, as the property of the latter. The only question in the case, is whether the Insurance Company, or the United States, are entitled to the teas, or their proceeds. Mr. Justice Story delivering the opinion of this Court, says:

> "Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider what is the nature and effect of the priority of the United States, under the statute of 1799, ch 128. Although that subject has been several times before this court, the observations which have fallen from the bar show that the opinions of the court have, sometimes, not been understood according to their true import. The 65th section of the act declares that 'in all cases of insolvency, or where any estate in the hands of executors, administrators and assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, etc., shall be first satisfied; and any executor, admin-

istrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof; A subsequent clause of the same section declares that 'the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.' It is obivious that this latter clause is merely an explanation of the term 'insolvency,' used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment. *Insolvency, then, in the sense of the statute*, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of the United States v. Hooe, 3 Cranch, 73, and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute. So, too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute; *but it must be manifested in one of the three modes pointed out in the explanatory clause already referred to.*"

Ten years later, in 1838, Joseph Story, Associate Justice of the Supreme Court, sitting with Ashur Ware, District Judge in the Circuit Court of the United States, October term, 1838, at Wiscasset, delivered the opinion of the Court, in the case of the *United States* vs. *Thomas McLellan, and others*, 3rd Summers reports, page 345. The question in this case was whether a conveyance by a debtor, known to be insolvent, of all his property to one or more creditors in discharge of their own debts and liabilities not exceeding the amount due and payable by them, and not for the benefit of creditors generally, or any other creditors, than the immediate grantees, is a "voluntary assignment" to creditors within the purview of the Act of 1799, Chapter 128, Section 65, so as to be effected by the priority of the United States unless it appear that it was made with the intent to evade the priority given, by the Act, to the United States. In the opinion delivered by Justice Story, it is held:

> "It is unnecessary, after the various decisions which have been made by the Supreme Court of the United States, upon this subject to enter at large upon the construction of these Sections."

By the Act of 1799, Chapter 125, Section 65, it is provided, that,

> "In all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds (for duties), shall be first satisfied."

If the clause had stopped here, it would have been open to consideration whether the insolvency here mentioned was not a mere inability of the debtor to pay all his debts, without the open, notorious act, pointed out

by law, to establish such insolvency, but the Section goes on to declare,

> "and the cases of insolvency, mentioned in this Section, shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts shall have made a voluntary assignment thereof, for the benefit of his or her creditors; or in which the estate or effects of an absconding, concealed or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."
>
> "Now upon the original interpretation of this Act, it might well have been a question whether the three cases thus put were anything more than mere illustrations of the general insolvency spoken of in the preceeding clauses of the Act. But this question has long since been put at rest by the Supreme Court of the United States in a variety of cases, and especially in the case of Price vs. Bartlett, 8th Cranch, 431; Thelusson vs. Smith, 2nd Peters, 396; Conard vs. the Atlantic Insurance Company, 1st, Peters, 387; Conard vs. Nicholl, 4th Peters, 291, and Beaston vs. the Farmers Bank of Deleware, 12th Peters, 102, in which it has been held that mere inability of the debtor to pay his debts, is not an insolvency within the meaning of the statute; but that it must be such as is manifested in one of the three modes pointed out in the last explanatory clause."

Again on page 357 of the report, it is said:

> "I take the naked question, then, stripped of all unimportant circumstances to be whether a conveyance by a debtor, known to be insolvent, of all his property to one or more creditors in discharge of their own debts, and liabilities, not exceeding the amount due and payable by them, and not for the benefit of creditors at large, or of any other creditors than the immediate grantees, is such a voluntary assignment as is within the purview of the Section of the Act of 1799? That it is a case within

the same mischief as that against which the Act meant to provide, I admit. That if the case had been wholly untouched by authority there might have been strong ground to contend that the three cases put in the Act were rather illustrations of the meaning of the word "insolvency" as used in the Act, than exclusive limitations on the meaning, I also admit. But looking to the decisions which have been made, I do not feel warranted in saying that such conveyances as the present are voluntary assignments, for the benefit of creditors, within the meaning of the Act unless, indeed, it could be shown that they were made with the intent to evade the priority given by the Act."

In *Robert Y. Brent*, vs. *The Bank of Washington*, 10th Peters Reports, 596; 9th L. Ed., 574, the facts were these: Robert Brent was the holder of six hundred fifty-nine (659) shares of stock of the Bank of Washington; he was also their debtor by reason of his endorsement of certain notes held by the Bank. He was the paymaster of the United States Government, and was largely indebted to it. He made a general assignment of all his property for the benefit of creditors but the trustees refused to act. He subsequently died and his property passed into the hands of executors. The specific contention in this case was that the United States claimed priority in payment of a debt due it under the Act of Congress and that the priority rights so established overreached the lien of the bank on its stock for a debt due it. It was held in the opinion written by Justice Baldwin that the lien given by the charter of the Bank upon Brent's stock was paramount to the rights of the United States under the Act of Congress.

We cite this case to again show that in all cases where the Act of Congress was relied upon as giving the United States the priority rights claim that it was based either upon the assignment of the debtor's prop-

erty for the benefit of his creditors or the decease of the debtor, and the distribution of his property by his administrators or executors—in other words that the priority was never recognized by the Courts under this Act of Congress, unless it was brought within one of the provisions of the Act itself.

In the case of the *United States* vs. *the State Bank of North Carolina*, 6th Peters, 29, 8th L Ed., 308, to which Mr. Justice Brandeis in the opinion of this court in the *United States* vs. *National Surety Company*, 254 United States, 74; 65 L. Ed., 143, makes reference.

It will be observed that in the former case, the United States by suit in the nature of a bill of equity, were seeking to recover against the State Bank of North Carolina and one Talcott Burr as assignee, of one William H. Lippett, the amount of Custom House Bonds owed by Lippett to the United States. In the case, Lippett, having become insolvent, made a voluntary assignment of all of his property to Burr, for the benefit of his creditors, by which assignment he gave a preference right to the State Bank of North Carolina, before payment to the United States.

The question for the Court's decision was whether the proiority of the United States, attaches, in case of a general assignment made by the debtor of his estate for the payment of his debts, comprehends a bond for the payment of duties executed anterior to the date of assignment, but payable afterwards. This Court held that:

> "The priority of the United States extends as well to debts by bonds for duties which are payable after the insolvency or decease of the obligor, as to those actually payable or due at the period thereof."

Again it will be observed that the decision in this

case came within that term of the Act of Congress which provides:

> "And the priority herein established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof."

This is the judicial construction given to this Act of Congress for more than a century. Should it now be overriden to give to the United States a priority in payment under conditions not incorporated in the Act itself? This right of priority of payment of debts due the government is a prerogative of the Crown of England well known to the common law. But here the claim of the United States to priority does not stand on any sovereign prerogative but is exclusively founded on the actual provisions of our own statutes. This received construction will induce this Court to hesitate before it will adopt another; as it would open those long established settlements, and would be productive of great difficulty and confusion.

Another early case decided within a year after the passage of the Act of Congress involved herein, which construes said Act, is the case of *James Gallagher against George Davis*, by the Supreme Court of the State of Pennsylvania, reported in the 2nd Yates, page 548, in which it is held:

> "A surety in a bond for duties on goods on importation into the United States, who pass the same to the Custom House, has no preference for his debt where the principal absconds as an insolvent person, unless he has made an assignment; or process in the nature of a domestic attachment has issued against him, or he has been declared a bankrupt."

The law of the Union does not apply to the case

stated. Congress in the clause of the 18th Section of the Act of the 2nd of May, 1792, have made a legislative declaration for the sense in which the words "cases of insolvency" shall be taken, and they must be restricted thereby to the three instances pointed out by the counsel for the defendant.

In the case of *M'Lean against Rankin and Hayer,* 3rd Johnson's Reports, 281, the Supreme Court of New York construing the Act of Congress herein involved, held:

> "To entitle the United States to a preference over other creditors, it must be shown that the debtor was insolvent and had voluntarily assigned all his property for the benefit of his creditors, or that an attachment has been taken out against his property as an absconding and absent debtor, and prosecuted to effect. If an attachment is taken out and afterwards withdrawn by consent of creditors, without any proceedings over it, it is inoperative, and gives no right of preference to the United States."

The Circuit Court of Appeals of the Eighth Circuit, on December 8th, 1919, in the case of the *American Surety Company of New York,* vs. *The Carbon Timber Company, et al.,* 263 Federal Reporter, page 295.

The opinion of the Court was written by Elliott, J.,; the facts were these:

The Carbon Timber Company being insolvent executed a trust deed, transferring all its property except that mortgaged to secure bonds to trustees, the property to be sold and the proceeds applied to the payment of their debts. The American Surety Company being on a Surety Bond of the Carbon Timber Company to the United States, were compelled to pay to the United

States, under their indemnity bond, a certain sum of money. The contention was made by The Carbon Timber Company, that the deed of trust executed by it was not such a transfer of its property as would bring in play Section 3466 of the Revised Statutes of the United States.

In the opinion it is said:

"The defendants prosecute the cross appeal with various assignments of error alleged to be so closely related that they are discussed by counsel together. It is especially urged that the trust deed executed by the Timber Company to defendants, Meyer and Olson, is not a deed of general assignment within the contemplation of Sections 3466 to 3468, inclusive, of the Revised Statutes of the United States which provide a priority of payment of debts due the United States, asserting that the instrument itself does not purport to be a deed of general assignment, etc."

The Court further in the opinion says:

"The facts are practically all admitted. There is so little controversy upon any material fact, that it is not worthy of discussion here. The Carbon Timber Company was insolvent when this conveyance was made; it transferred its property to the defendants, Meyer and Olson, as trustees, for the benefit of its creditors; all of the property then owned by it, except certain property that was contained in the deed of trust to secure payment of its bonds then outstanding, was transferred. Under the provisions of this deed, and the record as to the disposition of the property of the Timber Company by the trustees, this is clearly a case within the instrument, so termed a 'deed of trust', was in truth and fact an assignment for the benefit of creditors."

The Court further said:

"Applying the provisions of this statute to the facts alleged in the Bill of Complaint, both as stated

originally, and as amended, the Trial Court rightfully found that the plaintiff had brought itself within the provisions of the statute and was entitled to priority for the amounts so paid by it. It is admitted that The Carbon Company did not have property sufficient to pay its debts at the time it made this voluntary assignment, and, therefore, under the provisions of this statute, the debts due the United States have priority and must first be satisfied."

The most recent judicial construction of this Act is the case of *Davis, Director-General of Railroads*, v. *Pullen*, decided January 6th, 1922, in the first Circuit and reported in 277 Federal Reporter, at page 650. This recent expression of the Court with reference to the construction of the Act, shows the construction placed thereon in the cases heretofore cited.

In this case, the insolvent debtor consented to the appointement of a receiver of his property for distribution among his creditors. The consent to the receivership had the same legal effect as a voluntary assignment of the debtor's property to a Assignee for the benefit of his creditors.

As was said by Anderson Circuit Judge, writing the opinion:

> "Certainly when a debtor has assented to the appointment of a receiver on a bill which prays that its debts may be established and ordered to be paid out of its assets, and when on marshalling the assets and liabilities, it appears that such debtor is, and was, at the beginning of the proceedings hopelessly insolvent, it would seem plain that such insolvency was sufficiently notorious to bring the case within the fair meaning of the words "bankruptcy" and "insolvency" as used when the priority statute was enacted. There is no doubt that the assets of this corporation in custodia legis are being distributed to its creditors because it is in fact insolvent,

and because the proceedings by which it was disposed of its property *were assented to, if not indirectly invoked by it.*"

This, the latest expression of a Court construing the Act, conclusively shows that this case was brought within that provision of the Act of Congress which provides for the voluntary assignment of the insolvent's estate, for the benefit of all his creditors.

Marshall had, as shown by the cases cited, for a period of 35 years, as the Chief Justice of this court, given this act of Congress the construction now being urged by the State of Oklahoma. This great judge, the leading Federalist of his time, was ever sedulous in construing acts of Congress within the Constitution to be the paramount law of the land, and that acts of the legislatures of the states in opposition thereto must fall. This great principle of law was first declared by his opinion in the *McCullough* vs. *Maryland case*, *supra*. As startling as was this principle of the law to the Republicans of that day, it was not more so than his decision in the case of *United States* v. *Fisher*, *supra*, the leading case announcing the priority rights of the United States in the collection of debts due it from its debtors; and yet, in all of the opinions of this court during his long tenure as its Chief Justice, it will be found that the act of Congress was held to apply only under the modifications contained therein.

Marshall died on the 6th day of July, 1835. Only a few months before, at the January term, 1835, of this court, for the last time he was called upon to declare this court's opinion on the construction to be given to this act of Congress. It was in the case of *Field* v. *The United States*, 9 Pet., 182, 9 L. Ed., 94. In this case again, the priority rights of the United States were sustained upon the specific grounds that the debtor had made a

voluntary assignment of his estate to syndics for distribution to his creditors. In the opinion it is said:

> "The claim of the United States to the payment of the debt due to them out of the funds in the hands of the syndics is founded upon the priority given them by the 65th section of the Duty Collection Act of 1799, chap. 128; which in cases of general insolvency and assignment, like the present, provides that the debts of the United States shall be first satisfied out of the funds in the hands of the assignees."

The Legislative definition of the Act of Insolvency declared in this Act of Congress and its judicial construction have not been challenged for more than a century and will now withstand the assault made against them.

The act of Congress, Section 3466, Revised Statutes (Compiled Statutes 6372) directing that " debts due the United States shall be first satisfied", does not extend to cases where a particular State has a lien.

As early as 1805 the Supreme Court of Pennsylvania, construing the Acts of Congress giving priority in payment to it out of an insolvent debtor's estate, have held that where the State has a lien against the estate of the insolvent, that it is superior to the priority rights of the United States. It was so held in the case of the *United States of America against William Nicholls*, 4 Yeates, 251.

It is said in the opinion written by Yeates, Judge:

> "I can not bring myself to believe, notwithstanding the generality of the words used in the 5th section of the Act of Congress of 3rd March 1791, 'debts to the United States shall be first satisfied', that the provision therein contained was ever intended to extend to cases where an individual state was a creditor and as such was entitled, under its municipal laws, to a lien on

the estate real or personal, of the insolvent debtor. No section or clause in any part of the Act respects in the most distant manner the several states in their political and corporate capacity as competitors with the United States; but on the contrary every regulation and provision of the Act is confined to the settlement of accounts between the United States and individual citizens."

Under and by virtue of a legislative Act of Pennsylvania of 1785, it was provided:

> "That certain settlements made by the comptroller, with certain prescribed formalities, are declared to be liens upon the Real Estate of the debtor; in the same manner as if judgment had been given in favor of the commonwealth against such person for such debt in the Supreme Court."

The law of Pennsylvania of 1785 did not provide a procedure for the enforcement of the state's lien and not until the Act of 1785 was amended by the Acts of 1806 and 1807, was a remedy given to enforce the lien of the State of Pennsylvania upon the insolvent debtor's lands.

In 1833, twenty-two years after the decision in the Pennsylvania case, the legislative Acts of Pennsylvania referred to, were drawn in question in a case submitted to the Supreme Court of the United States. In *Lessee of Edward Livingston* vs. *Moore et al.* reported in 7th Peters at page 469, 8th Law Edition, page 751, this court construing the Pennsylvania Acts in its opinion delivered by Justice Johnson says:

> "The great proportion of the arguments for plaintiffs, both here and below, were devoted to the effort to prove that the two settlements enumerated were not subsisting liens at the time of passing of the two Acts of 1806 and 1807 under which the sale was made to the defendants. But from this,

as a subject of adjudication, we feel relieved by the two decisions cited from the 4th volume of Yeates Reports, since it appears that this very lien of the 3rd of March 1796, has been sustained by a decision of the highest tribunal in that State as long ago as 1803. (Daniel Smith vs. John Nicholson, 4th Yeates); and that again in 1805, this decision was considered and confirmed in another case in which the several applications of the principles established in the first case came under consideration." (U. S. of America vs. Wm. Nichols 4th Yeates 251).

It is further said:

> "The titles to the lands under the Acts of the Legislature of the State of Pennsylvania, providing for the sale of the landed estate of John Nicholson, in satisfaction of the liens of the State held on those lands, and the proceedings under the same are valid. These Acts and the proceedings under them do not contravene the provisions of the Constitution of the United States in any manner whatsoever."

It was argued in the *Livingston case* that the Acts of Pennsylvania were unconstitutional in that the Commissioners appointed under the Acts were given authority to sell the land of the insolvent debtor and that the Act failed to provide a remedy to be followed in the courts of the State. It was argued that the community sits in judgment in its own cause when it confirms the debt to be due for which the land is subject to sale and then subjects the land to sale to satisfy its own decision thus rendered. Answering this contention in opposition to the Acts referred to, this court says:

> "This view of the Acts of the State is clearly not to be sustained by a reference to the facts of the case. As to the judgment of 1797; that is un-

questionably a judicial Act as to the settled accounts, the lien is there created by acts of men who quoad hoc were acting in a judicial character; and their decision being subject to an appeal to the ordinary or rather to the highest of the tribunals of the country, gives to those settlements a decided judicial character: *and were it otherwise, how else are the interests of the State to be protected?* The body politic has its claim upon the constituted authorities as well as individuals and if the plaintiffs course of reasoning could be permitted to prevail, it would then follow that provisions might be made for collecting the debts of everyone else, but those of the States must go unpaid whenever legislative aid became necessary to both. This would be pushing the nature and reason of things beyond the limits of natural justice."

As the laws referred to gave that state a statutory lien upon all of the real estate of the insolvent debtor, so does the statutory laws of Oklahoma give the State a lien upon all of the assets of an insolvent State Bank, in the event of the Bank's insolvency under conditions hereafter referred to. The validity of any lien on the property of a bankrupt and insolvent debtor must always be determined by the State law. It is so determined by all of the authorities and so held specifically *in re United States Lumber Company*, 206 Federal Reproter, page 236.

Under the law of Oklahoma as found in Section 302 of the Revised Laws of Oklahoma, 1910, the bank commissioner is given authority, when he becomes satisfied of the insolvency of a State Bank, and after due examination of its affairs, to take possession of said Bank and all its assets, and is authorized to proceed to wind up its affairs and enforce all liabilities due it.

By statutory enactment by the Legislature of Oklahoma, there is created a Depositors' Guaranty Fund by levying against the capital stock of a State Bank an annual assessment equal to one-fifth of one per cent of its average daily deposits during its continuance as a banking corporation, which fund shall be used solely for the purpose of liquidating deposits of failed banks and of retiring Warrants provided for in said Act.

The Act further provides that in the event that the funds so created shall be insufficient to pay the depositors of failed banks, the Banking Board of Oklahoma shall have authority to issue certificates of indebtedness to be known as Depositors Guaranty Fund Warrants of the State of Oklahoma, in order to liquidate the deposits of said failed banks. (Section 3, Chapter 22, of the Session Laws, 1913, of Oklahoma).

It is further provided by the statute law of Oklahoma, (Section 303 of the Revised Laws of Oklahoma, 1910) as follows:

> "In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockhold-

ers, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

It is under and by virtue of this legislative act of Oklahoma it is claimed that it has a lien upon all of the assets of an insolvent bank which is superior to the priority rights of the United States under the acts of congress plead in plaintiff's complaint.

It is alleged in the Bill of Complaint, (page 6, paragraph 7) that on the 26th day of October, 1921, the bank commissioner of the State of Oklahoma, pursuant to the authority vested in him by the laws of that State, adjudged the Oklahoma State Bank of Guthrie, Oklahoma to be insolvent, and thereupon took charge and possession of its assets for the purpose of liquidating the same.

It is further plead by the complainant, (page 8, paragraph 11) that the repayment of the sum of $42,000.00 on deposit in said Oklahoma State Bank, to the credit of the United States, was refused on the ground that the State of Oklahoma under its laws and especially under Section 303 of the Reviesd Laws of Oklahoma, 1910, has a first lien upon the assets of said bank for the benefit of the Depositors' Guaranty Fund, for the purpose of paying the bank's unsecured depositors, and that the complainant is therefore not entitled to have its debt paid until the lien of the State of Oklahoma for the benefit of the unsecured depositors has been satified; and that said Section 3466 of the Revised Statutes of the United States has no application in the administration of the assets of an insolvent bank in the State of Oklahoma.

There will be no controversy that the deposit of $42,000.00 in the Oklahoma State Bank of Guthrie, Oklahoma, was made by one D. Buddrus as cashier of the Five Civilized Tribes of Indians in Oklahoma; that to secure the repayment of said deposit the government through the Secretary of the Interior took a surety bond from said bank to protect and guarantee the prompt repayment of said deposit and that the surety on said bond is wholly solvent, able to, and would pay said sum to the United States upon its demand. That pursuant to said Section 303 of the Revised Laws of Oklahoma, 1910, (supra) the depositors of said Oklahoma State Bank were paid in full out of the Depositors' Guaranty Fund of Oklahoma, the sum of $285,000.00 and Guaranty Fund Warrants were paid them in the sum of $304,058.85, and it is by reason of these payments, under the laws of Oklahoma, that the defendant, the State of Oklahoma, claims a lien upon the assets of said bank which is superior to any rights of the United States of America under said Section 3466 of the Revised Statutes of the United States.

Since the decision of this court in the case of *Noble State Bank* vs. *C. N. Haskell, Governor of Oklahoma*, 219 U. S. 104, 55 L. Ed., 112, the constitutionality of the Oklahoma law creating its Depositors' Guaranty Fund can no longer be challenged, it being said by this court in its opinion delivered by Justice Holmes:

> "The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, and cannot

be regarded as depriving a solvent bank of its liberty or property without due process of law."

The Legislative Act of Oklahoma, 303, (*supra*) under which this lien is claimed has been frequently construed by the Supreme Court of Oklahoma. It is said, in its opinion in the case of *Lankford* vs. *Schroeder*, 147 Pacific Reporter, page 1049:

> "The State Guaranty Fund is the property of the state as much as ad valorem taxes collected for the state's maintenance, *and the state has a first lien on the assets of a failed bank in the hands of the state bank commissioner*, to secure reimbursement of the Guaranty Fund for sums paid therefrom to the depositors of said bank, and no suit can be maintained by a creditor of the bank against the bank commissioner for the application of such assets or Guaranty Fund to the payment of his claim."
>
> "A suit against the state bank commissioner to compel him to pay a debt against a failed bank out of the State Guaranty Fund, or out of the assets of such bank, in his hands, as such officer, under the banking law, is in effect a suit against the state and cannot be maintained without the state's consent."

Again in the case of *Lankford, state bank commissioner*, vs. *Oklahoma Engraving and Printing Company*, 130 Pacific, page 278. In construing Section 323, Compiled Laws, 1909, which is now Section 303 Revised Laws, 1910, which provides that the state shall have, for the benefit of the Depositors' Guaranty Fund, a first lien upon the assets of any defunct bank or trust company, and all liabilities against the stockholders, officers or directors thereof, and against all persons, corporations or firms; and that such liabilities may be enforced by the state for the benefit of the

Depositors' Guaranty Fund. That the effect of this statute is to make the state a preferred creditor until any deficiency in the Guaranty Fund created by the payment therefrom of the depositors of an insolvent bank is made up.

Again in the case of *State ex rel. Taylor, state examiner*, vs. *Cockrell, state bank commissioner*, 112 Pacific, page 1000, it is held:

> "The title of such depositors' Guaranty Fund vests in the state just as much as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose."

It has been further determined that no deposit in a state bank, otherwise secured, is protected by, or payable out of the State Guaranty Fund or the assets of an insolvent bank. This holding applies to all deposits whether of a private charter or deposits belonging to the state or a municipality thereof.

> *Lovett et al, Creek County Commissioners*, vs. *Lankford*, 145 Pacific Reporter, page 767.
>
> *Columbia Bank and Trust Company*, vs. *United States Fidelity and Guaranty Company*, 126 Pacific Reporter, page 556.
>
> *National Surety Company*, vs. *State Banking Board*, 152 Pacific Reporter, page 389.

The principle of law laid down in these decisions were challenged on constitutional grounds. In the case of *Lankford* vs. *Platt Iron Works Company*, 235 United States, 461; 59 L. Ed. 316. In the opinion of this court delivered by Justice McKenna, it is said:

"The validity under the police power of Oklahoma laws under which a Bank Depositors' Guaranty Fund is created by the levy of an assessment upon the state banks for the purpose of securing the full repayment of deposits in case any such bank becomes insolvent is not effected because the state instead of committing the fund to the mere ministerial administration of the state banking board, and subjecting them to controversies with depositors may have vested the title to the fund in itself, so as to extend to the board the state's immunity from suit.

The title of the state to the Bank Depositors' Guaranty Fund created under Oklahoma laws by levy of an assessment upon state banks to secure the full repayment of deposits in case any such bank becomes insolvent and the interest which the state has, that such fund be administered by the State Banking Board appointed under the statute for that purpose, rather than by a judical tribunal, are such that a suit brought by a depositor in an insolvent bank to compel such board to pay the deposit out of the fund, or if that be insufficient, to issue a certificate of indebtedness and levy an assessment to make up the deficit in the fund, is a suit against the state, which under United States Constitution, 11th Amendment, cannot be maintained without the state's consent."

In the opinion it is further said:

"It, (the state) is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors and against other persons, which may be enforced by the state for the benefit of the fund which its law has created."

In the *Lankford* vs. *Platt Iron Works Company* case the court had before it for judicial construction, the effect of Section 303 of the Revised Laws of Oklahoma (*supra*) under which the state claimed a prior

lien upon the assets of an insolvent bank, and it was specifically held that the lien so created under the state law could not be successfully challenged on constitutional grounds—the court saying:

> "Certainly this construction can be given to the Oklahoma statute and granting that it may admit of dispute, an important element to be considered is the decision of the state tribunal."

The court cites in support of its holding, the holding of the Supreme Court of Oklahoma, in the case of *State ex rel. Taylor*, vs. *Cockrell; Lovett* vs. *Lankford; Lankford* vs. *Oklahoma Engraving and Printing Company; Columbia Bank and Trust Company* vs. *United States Fidelity and Guaranty Company* (*supra*); and sustains the validity of the lien of the State of Oklahoma upon the authority of these cases.

It is not contended by the State of Oklahoma that the United States must by reason of the Oklahoma law, and their judicial construction by the courts, be compelled to submit its claim for payment to the banking board of Oklahoma. The government has the right, if the act of Congress is applicable to the administration of an insolvent state bank in Oklahoma to pursue the funds of the bank in the hands of the commissioner, or sue him if a distribution is made without paying the claim. It has been determined in the case of *Lewis, trustee*, vs. *the United States*, 92 U. S. Reports, 617, that the United States was under no obligation to prove its debt in the bankruptcy proceedings.

In *United States* vs. *Herron*, 20 Wallace Reports, 251 it was held,

> "that no general words in the statute divest the government of its rights or remedies."

It is not contended that the insolvency laws of the

state can override a valid act of Congress in opposition therewith.

Ever since the decision in *M'Culloch* vs. *the State of Maryland*, 4th Wheaton, 316; 4th L. Ed. 579, it has been settled that:

> "The states have no power by taxation or otherwise, to regard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government."

The state of Oklahoma, under its statutory lien contends that whatever rights the government of the United States has, under the act of Congress relied on, is subject to, and inferior to the rights of the state of Oklahoma. It has never been determined that the rights of the United States to priority in payment out of the assets of an insolvent debtor, overrides any transfer of the debtor's property in the usual course of business or disturbs any lien attaching thereto, general or specific.

As early as 1804, in the opinion of this court delivered by Chief Justice Marshall, in the case of the *United States*, vs. *Fisher et al*, 2nd Cranch, 358; 2nd L. Ed. 304. it was held:

> "On this subject it is to be remarked that no lien is created by this law. No bona fide transfer of property in the ordinary course of business is overreached. It is only priority in payment which under different modifications is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living; though it takes effect generally if he be dead."

That no lien was created by the statute was again affirmed in the opinion of this court, written by Chief

Justice Marshall in 1805. In the case of the *United States* vs. *Hooe*, reported in the 3rd Cranch, 73; 2nd L. Ed. 370, it is said:

> "The United States have no lien on the real estate of their debtor until suit brought or a notorious insolvency or bankruptcy has taken place, or being not able to pay all his debts, he has made a voluntary assignment of all his property, or the debtor having adsconded, concealed or absented himself, his property has been attached by process of law."

Again in *Thelusson* vs. *Smith*, reported in the 2nd Wheaton, page 396, 4th L. Ed. 271, this court held:

> "But if before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been siezed under an execution, the property is divested out of the debtor and cannot be made liable to the United States."

In the opinion delivered by Washington J., it is further said:

> "Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied, but there can be none in relation to the debts due from the debtor of the United States to individuals; the United States are to be first satisfied; but then it must be out of the debtor's estate. If therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been siezed under a fi. fa., the property is divested out of the debtor and cannot be made liable to the United States."

In the case of *John Conard* v. *Atlantic Insurance Company, New York*, 1st Peters 386, 7th Law Edition, 189, in the opinion of the Court written by Mr. Justice Story, it is said:

> "But it has never yet been decided by this court that the priority of the United States will divest a specific lien attached to a thing, whether it be accompanied by a possession or not."
>
> "The case of Tullison vs. Smith 2nd. Wheaton 396, turned upon its own particular circumstances and did not establish any principles different from those which are recognized in this case. And it established no such proposition as that a specific and perfected lien would be displaced by the mere priority of the United States."

In the case of *Robert Y. Brent, Surviving Executor of Robert Brent, Use of the United States, Appellant*, v. *The President and Directors of the Bank of Washington*, 10 Pet., 596, 9 L. Ed., 547, in the opinion of this court, delivered by Justice Baldwin, it is held:

> "This preference is in the appropriation of the debtor's estate; so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transfered in the ordinary course of business, neither are overreached by the statute; and it has never been decided that it affects any lien, general or specific existing when the event took place which gave the United States a claim of priority."

In this case Robert Brent was the holder of 659 shares of stock in the Bank of Washington, and was indebted to the bank as endorser on certain promissory notes, one of which became due after his death. He was also indebted to the United States as pay-master, and he made an assignment of his property to satisfy the debt. The assignee did not accept the assignment. He died

some time afterwards. The bank, under the provisions of their charter, which gives a lien on the stock held by a debtor for the payment of debts due to them before the transfer of such stock held by a stockholder, insisted on the lien against the claim of priority by the United States, and their claim was sustained by the court.

As the Bank of Washington's lien under its charter was held to give it a superior claim upon the stock issued by it, in the hands of the executors of Robert Brent as against the priority rights of the United States, so the statutory lien, Section 303 of Revised Laws, Oklahoma, 1910, gives the defendant state a lien upon all of the assets of the Oklahoma State Bank, insolvent, superior to the priority rights of the United States herein.

This Act of Congress does not apply in the liquidation of an insolvent National Bank. To sustain the provisions of the Act in the liquidation of the State Banks in Oklahoma, will directly affect the interests of many thousands of creditors of such banks. Rigorous law is often rigorous injustice. Ever since Oklahoma was admitted to the sisterhood of states, it has had a banking system, the constitutionality of which, shortly after its enactment, was assailed, but it constitutionality was sustained by this Court in the case of *Noble State Bank* vs. *Haskell*, 219 U. S. 104; 55 L. Ed. 112. Under the provisions of this law the unsecured debtors of a bank in the event of the bank's insolvency are paid in full out of the Depositors' Guaranty Fund. This fund is created by assessment against the state banks, and also by the collection of the assets of insolvent banks, after the depositors of the banks are paid in full.

This is the fund that has been held by this court in the case of *Lankford* vs. *Platt Iron Works*, 235 U. S. 461, 59 L. Ed., 361, to be a fund of the State as much as the

common school funds were funds of the state, and that the state had a first and prior lien against the assets of every insolvent state bank, for the purpore of indemnifying it for the money advanced out of the fund, in the payment of the bank's unsecured depository creditors. It is only the unsecured depositors who are paid out of the fund. The United States of America was not an unsecured depositor in the Oklahoma State Bank. It made its deposit under, and by virtue of an Act of Congress approved May 25th, 1918, Chapter 86, 40 Stat. 561, 592, and under the rules and regulations promulgated by the Department of the Interior, which Act of Congress authorized the deposit to be made, provided it be secured by the deposit of United States Bonds, and the rules and regulations of the Department of the Interior provided the taking by the Secretary of the Department for the benefit of the United States, satisfactory bond or bonds in amount equal to the maximum sum so deposited.

Pursuant to the Act of Congress and the rules of the Department of the Interior, there was executed by the Oklahoma State Bank of Guthrie, a Depository Bond upon which the Fidelity and Casualty Company of New York were surety, and the United States of America was obligee, in a sum exceeding the amount of the deposit involved in this case.

This bond at the time of the insolvency of the Bank was in full force and effect. The surety upon the bond will pay to the government of the United States the amount of its obligation upon demand. This being a secured deposit, it is one which, under the laws of Oklahoma, is not protected by, or payable out of the Depositors' Guaranty Fund. It has been so held by the Supreme Court of Oklahoma in the case of *Columbia Bank and Trust Company* vs. *United States Fidelity and Guaranty Company*, 126 Pacific 556, decided in 1912.

In 1915, there was passed a legislative Act, Section 5, Chapter 58, Session Laws of Oklahoma, 1915, which is as follows:

> "On and after the passage and approval of this Act, in all cases where a surety company is compelled to pay, or voluntarily pays, a deposit of any state, county, municipal or other public funds for which it is liable in a failed bank, operating under the banking laws of this state, such surety company shall be entitled to participate in a pro rata division of the proceeds of the assets of any such bank with the depositors' guaranty fund; and the Bank Commissioner shall have exclusive control of the administration and collection of the assets of failed banks, in which any part of the depositors' guaranty fund has been used for payment of depositors, until the depositors' guaranty fund is fully reimbursed and the Banking board shall pay to such surety company its pro rata share of the proceeds of such assets from time to time as collections from such assets are made; and such surety company in writing a depository bond for any such bank specifically agrees to such administration and that the Bank Commissioners jurisdiction shall be exclusive. All public deposits secured by surety company bonds or by the assets of any bank shall be included in the computations of average daily deposits as a basis for assessments for the depositors' guaranty fund."

It may be suggested by counsel for the complainant, that this Act of the Legislature of Oklahoma, does not affect the rights of the United States given them by the Act of Congress relied on.

To this we answer, that if the Secretary of the Interior makes a simple demand for the payment of the debts due the United States from the surety company on its bond, that the United States will no longer

have an interest under its bill of complaint, and then the surety company writing the bond under the laws of Oklahoma will receive the benefits of that law, as it was contemplated they should receive, when entering into its contract of indemnity.

The surety upon the bond, however, is vitally interested in obtaining from this Court, a judicial construction of the Act of the 2nd of March, 1799, which will relieve them entirely from any obligation, under their indemnity contract.

We are now confronted by the discovery of an Act of Congress passed 124 years ago, the original purpose of which was to give the United States, under certain modifications, priority rights in the collection of a debt due it from its revenue officers.

It is true that the maxim, "*Cessante ratione legis, et ipsa lex*" has no application to statutory law, and in consequence it occasionally happens that a statute enacted to meet conditions long passed, is forgotten for several generations and then resurrected by someone desirous of causing trouble.

As before suggested, the Act of Congress does not apply to the liquidation of a national bank. It was so held in the case of *United States* vs. *Cook County National Bank*, 107 United States, 445. The Court in passing upon this case, did not consider, nor did it pass upon the question as to whether the taking over of a national bank by the comptroller of the currency and placing all its affairs in the hands of a receiver for liquidation brought the bank within the terms of the Act of Congress relied upon, to create a preference right in behalf of the United States, in the payment of a debt due it from such bank.

The Court, however, did specifically hold that the United States was relegated to the same class as other general creditors of the bank and denied its right to payment in preference over such other creditors.

The United States should not be given a greater right in the payment of a debt due it from a state bank, than from a bank under its own creation.

We do not contend that the Legislative Act of Oklahoma which gave to it a lien upon all of the assets of an insolvent state bank is such an Act as can override a constitutional Act of Congress, but we do most seriously urge that the Act of Congress relied upon here, gives a legislative definition of the term "Insolvency" to mean to be a voluntary assignment of all of the debtor's property for the benefit of his creditors. This view is fully sustained by the authorities we have cited.

If the Oklahoma State Bank, although unable to meet its obligations in the usual and customary manner has not, as the Act of Congress provides, made a voluntary assignment of its property, or if its estate and effects have not been attached as an absconding, concealed or absent debtor by process of law, or if the bank has not committed an Act of bankruptcy as such Act is known under the law, then the Act is inapplicable and unenforceable as applied to the liquidation of this bank.

We urge three grounds in our motion to dismiss the bill of complaint:

1st. That the Act of Congress properly construed does not bring the liquidation of the Oklahoma State Bank of Guthrie within its purview and terms.

2nd. That the State of Oklahoma, by reason of its

Depositors' Guarantly law has a first and superior lien upon the assets of the insolvent Oklahoma State Bank of Guthrie, and that whatever rights the United States may have under the Act of Congress are subject to the prior rights of the State of Oklahoma under its laws, and

3rd. That the Act of Congress relied on is unenforceable and inapplicable where a sovereign state is a creditor of the debtor.

We submit to this Honorable Court these three propositions in opposition to the granting of the relief to the United States as prayed for in its bill of complaint, confidently believing that they are supported by the laws of the land.

GEORGE F. SHORT,
Attorney General.
WILLIAM H. ZWICK,
Assistant Attorney General.
Counsel for State of Oklahoma.

Original No. 25

In the Supreme Court of the United States of America

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, *Plaintiff*,

VS.

THE STATE OF OKLAHOMA, *Defendant*.

Motion to Dismiss

GEORGE F. SHORT,
Attorney General.

WILLIAM H. ZWICK,
Assistant to the Attorney General.

Counsel for Defendant.

In the Supreme Court of the United States of America

OCTOBER TERM, 1922.

No. Original.

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THE STATE OF OKLAHOMA, *Defendant*.

Motion to Dismiss

Comes now the State of Oklahoma, by its Attorney General and moves the Court to dismiss the Bill of Complaint herein for the reason and on the ground that the allegations of said bill of complaint do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant or to entitle the plaintiff to the relief prayed for, in this, to-wit:

A.

That Section 3466 of the Revised Statutes of the United States plead and relied upon by plaintiff herein are inapplicable and uninforceable against the State of Okla-

homa, in its administration of the liquidation of the Oklahoma State Bank of Guthrie, Oklahoma.

B.

That the defendant, The State of Oklahoma, under the laws of Oklahoma as plead in the Bill of Complaint, has a lien on all of the assets of said Oklahoma State Bank of Guthrie, Oklahoma for the reimbursement of the defendant by reason of the payment by it of the unsecured depositors of said bank, and that the alleged rights of the United States of America are inapplicable and unenforceable against the State of Oklahoma until the obligations for which said lien is given is fully paid and satisfied.

C.

That said Section 3466 of the Revised Laws of the United States is invalid in so far as the same asserts priority in payment of a debt due the United States in opposition to the payment of a debt due the State of Oklahoma.

WHEREFORE, The State of Oklahoma moves this Court to dismiss the Bill of Complaint herein and that defendant have its costs herein.

GEORGE F. SHORT,
Attorney General.

WILLIAM H. ZWICK,
Assistant to the Attorney General.

Counsel for Defendant.

262-274

Supreme Court of the United States.

October Term, 1922.

No. 27, Original.

IN THE MATTER

of

The Petition of JAMES C. DAVIS, as Director General of Railroads, as agent, for a writ of prohibition and/or mandamus, against the HONORABLE LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and officers of said court.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner,
Office and P. O. Address,
No. 64 Wall Street,
Borough of Manhattan,
New York City.

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1

Motion.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No..... ORIGINAL.

IN THE MATTER
of
The Petition of JAMES C. DAVIS, Director General of Railroads, as Agent, for a Writ of Prohibition and/or Mandamus,
against
The Honorable LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said court.

2

3

Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus.

And now comes the petitioner, James C. Davis, Director General of Railroads, as Agent, by his proctors, and moves:

4

Motion.

1. For leave to file petition for a Writ of Prohibition and/or a Writ of Mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Southern District of New York and the Honorable Learned Hand, a judge thereof, and the other judges and officers of said Court, to show cause why a Writ of Prohibition and/or a Writ of Mandamus should not issue against them
5 and each of them, in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief therein as may be just.

T. Catesby Jones,
James W. Ryan,
Proctors for Petitioner.

6

7

Petition.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No..... ORIGINAL.

IN THE MATTER
of
The Petition of JAMES C. DAVIS, Director General of Railroads, as Agent, for a Writ of Prohibition and/or Mandamus,

8

against
The Honorable LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said court.

9

Petition for a writ of prohibition and/or writ of mandamus.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

10 *Petition.*

The petition of James C. Davis, Director General of Railroads, as Agent, appointed pursuant to the provisions of Section 206 of the Transportation Act of 1920, against the Honorable Learned Hand, a judge of the District Court of the United States for the Southern District of New York, sitting in Admiralty, and against all of the other judges and officers of said court, respectfully represents:

11 First: That on February 19th, 1920, the New Jersey Shipbuilding & Dredging Company, owner of a certain Drill Scow designated as No. 3, filed a libel in the District Court of the United States for the Southern District of New York, in admiralty, against the steamtug "Mahanoy", her engines, etc., to recover damages in the sum of about Sixty Thousand ($60,000.00) Dollars, resulting from a collision on or about November 7th, 1919, between said Drill Scow "No. 3", which was moored in about the middle of the East River, New York Harbor, engaged in ex-
12 cavating the bed of said river at that place, and the steamtug "Mahanoy" and her tow of 18 loaded coal boats. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, issue against the said steamtug "Mahanoy", and that the Court decree to libellant payment of its damages, together with interest and costs, and that the said steamtug be condemned and sold to satisfy same. A copy of the libel, as part of the record of the proceedings in said District Court, is hereto annexed.

13

SECOND: That thereafter and on May 25th, 1920, a consent order was made and entered amending said libel by

"substituting in the title, the first paragraph and the prayer therein, Walker D. Hines, as Director General of Railroads, as Agent, for and in the place of the steamtug 'Mahanoy', her engines, etc., with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said 14
suit, and that said libel be further amended by inserting the following additional article:

'NINTH: Upon information and belief, the Lehigh Valley Railroad Company and its steamtug 'Mahanoy' at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent Walker D. Hines, as Director General of Railroads.

15

'Pursuant to the provisions of Section 206 of the "Transportation Act, 1920" the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said

President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.

'Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its steamtug 'Mahanoy' as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought against the latter in conformity with the provisions of said "Transportation Act".'

JOHN C. KNOX,
U. S. D J."

A copy of said order, as part of the record of proceedings in said District Court, is hereto annexed.

THIRD: That thereafter and on July 1st, 1920, the respondent (the petitioner herein), by Harrington, Bigham & Englar, his proctors, filed an answer to said libel and also a petition under the 59th (now 56th) Rule in Admiralty, impleading John Barton Payne, Director General of Railroads, as agent for the New York, New Haven & Hartford Railroad Company, owner of the steamtug "Transfer No. 20". Said petition alleged that the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the said

steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her in the particulars therein pointed out and prayed that John Barton Payne, Director General of Railroads, as agent for the New York, New Haven and Hartford Railroad Company, owner of the steamtug "Transfer No. 20" be cited to appear and answer the matters in the libel and petition and that if any damages should be decreed the libellant that the decree might be entered against the said John Barton Payne, Director General of Railroads as agent for the said New York, New Haven & Hartford Railroad Company. Copies of said answer and petition, as part of the proceedings in said District Court, are hereto annexed.

FOURTH: That thereafter and on July 7, 1920, John Barton Payne, Director General of Railroads, as Agent for the New York, New Haven & Hartford Railroad Company, impleaded, appeared in said action by Charles M. Sheafe, Jr., his proctor, and on October 13th, 1920, filed a bill of exceptions to said impleading petition on the ground that:

"Any decree for damages to which the original libellant herein may be entitled will necessarily be satisfied pursuant to law out of a common fund belonging to the United States and either derived from the

22 *Petition.*

operation of said railroads, including the transportation system of the Lehigh Valley Transportation Company, the Lehigh Valley Railroad Company, or out of the revolving fund or funds appropriated by the aforesaid Acts."

and that thereafter and on January 11th, 1922, after argument of said exceptions, they were sustained and the libel and impleading petitions were dismissed without costs, and an order to
23 this effect was made and entered. Copies of said notice of appearance, exceptions and order, as part of the record of proceedings in said District Court, are hereto annexed.

FIFTH: Annexed hereto, marked Exhibit A is a history of the legislation and executive orders relating to the Federal control of railroads during the period from December 28th, 1917, to March 1st, 1921.

SIXTH: That on January 11th and 12th, 1922,
24 said action, together with two other similar actions arising out of the same collision and also brought against Walker D. Hines, Director General of Railroads, without the issuance or service of process, proceeded to trial and were tried before Honorable Learned Hand, one of the judges of said court, and that at the trial it was urged by the respondent (the petitioner herein) that the Court could not exercise jurisdiction over the respondent, Walker D. Hines, Director General of Railroads, as agent, since

process had not been issued and served in accordance with the provisions of said Section 206, subdivision (b) thereof, said Act, and that the Court was without jurisdiction to proceed against said Walker D. Hines or to hear and determine the matters alleged in said libel. The Court, however, ruled that the respondent having appeared voluntarily by his proctors and filed a notice of appearance, could not then be heard to say that the Court had not acquired jurisdiction, assumed jurisdiction, and awarded an interlocutory decree and order of reference to compute damages to the libellant, without finding the Director General as operating The Lehigh Valley Railroad negligent, and on February 18th, 1922, an interlocutory decree and order of reference to compute damages, and amending the libel by substituting James C. Davis as respondent in the place and stead of Walker D. Hines, was made and entered. A copy of the minutes of the trial showing the ruling of the Court, and of said interlocutory decree, as part of the record of proceedings in said District Court, are hereto annexed.

SEVENTH: That a certified copy of the record of proceedings in said District Court of the United States for the Southern District of New York, filed in the said cause, is hereto annexed and made a part hereof.

EIGHTH: That, although the respondent offered to give testimony tending to prove that

28 *Petition.*

the injury, of which the libellant complained, was sustained as a result of the negligence of the servants, agents and employees of the Director General of Railroads, as operating the New York, New Haven & Hartford Railroad Company, the District Court refused to permit the same to be made. The District Court ruled that the injury was admittedly due to the negligence of the servants of the Director General of Railroads, and therefore, it was immaterial in so
29 far as the liability of the Director General was concerned, whether these servants were employed in the operation of the Lehigh Valley Railroad Company or of the New York, New Haven & Hartford Railroad Company. (See extract of Minutes and rulings of Court on page here-of.

NINTH: That, by virtue of the Transportation Act of 1920, section 206, the United States of America cannot be sued through the Director General of Railroads, except in accordance with
30 the permission granted by the said Act of Congress; and that, by the terms of that Act, no suit can be brought unless process has been served upon an agent or officer of the Transportation Company, whose property the Director General was operating and only in respect of the acts or want of care of the servants and agents of the Director General as operator of such property.

31

TENTH: By the terms of the Act of Congress of March 21st, 1918, carriers, while under Federal control, are made subject to all laws and liabilities as common carriers, and it was further provided that:

> "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government."

32

ELEVENTH: This suit was instituted on February 19th, 1920, against the tug "Mahanoy", then operated by the Federal Railroad Administration, but the said tug was not arrested by the marshal of the court, nor was claim filed to said tug by the Director General. On February 28th, 1920, the act, known as the Transportation Act of 1920, was approved by the President. By the terms of that act

33

> "Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control

34 *Petition.*

could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose."

Thereafter the libel was amended by Court order as set forth in paragraph "Second" hereof.

TWELFTH: It is respectfully submitted that the District Court exceeded its jurisdiction when
35 it held that in this action the Director General of Railroads was in court for all purposes, and that the Director General of Railroads could be made to respond for faults of any of his servants, agents and employees, although these servants, agents and employees were not employed by the carrier against which the suit lay, but were employed to operate an entirely separate and distinct system of transportation belonging to another carrier, to wit, the New York, New Haven & Hartford Railroad. It
36 respectfully submits that such a holding permits the maintenance of a suit against the said Director General which is not in accordance with the terms of the Act of March 21st, 1918, known as the Federal Control Act, and the Act of February 28th, 1920, known as the Transportation Act, and that no suit can be maintained against the said Director General except in accordance with the terms of said Acts of Congress.

37

THIRTEENTH: That, if the suit, because of the amendment of the libel, be construed to be a suit brought pursuant to the Act of February 28th, 1920, known as the Transportation Act, the said suit was improperly brought because no process was served on any officer or agent of the Lehigh Valley Railroad Company or the Lehigh Valley Transportation Company as required by sub-section B, Section 206 of the Act of February 28th, 1920, known as the Transportation Act.

38

FOURTEENTH: That the said District Court erred in holding that the Director General of Railroads, having appeared in the said suit, was estopped from objecting to the Court's jurisdiction in respect of amendment made to the said original libel, where no process was served pursuant to the terms of the Act of February 28th, 1920, known as the Transportation Act.

WHEREFORE, your petitioner, the aid of this Honorable Court respectfully requesting, prays: 39

1. That a Writ of Prohibition be issued out of this Honorable Court to the said Honorable Learned Hand, Judge of the United States District Court for the Southern District of New York, and/or the other judges and officers of said court, prohibiting him and them from taking any further steps whatsoever in the cause aforesaid, and, generally, from the further

exercise of jurisdiction in said cause, or the enforcing of any order, judgment or decree made under color thereof.

2. That, in the alternative, a Writ of Prohibition be issued by this Honorable Court to the said Honorable Learned Hand, a Judge of the United States District Court for the Southern District of New York and/or the other judges and officers of said court, prohibiting him or them from taking any further steps whatsoever in the cause aforesaid, in so far as the loss complained of may have been caused by the negligence of the servants, agents and employees of the Director General of Railroads as the operator of the New York, New Haven & Hartford Railroad Company, and in so far as the said Court, and/or any of the judges thereof may hold or attempt to hold the said Director General of Railroads, as operator of the Lehigh Valley Railroad Company, and/or the Lehigh Valley Transportation Company, responsible for the negligence of the servants, agents and employees of the said Director General of Railroads, as operator of the New York, New Haven & Hartford Railroad.

3. That a Writ of Mandamus be issued out of and from this Honorable Court, directing and commanding the Honorable Learned Hand, a Judge of the District Court of the United States for the Southern District of New York, to vacate the interlocutory decree and order of reference so made and entered by him, as prayed

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for in the libel filed in said cause, and either to enter a final decree, dismissing the libel filed by the New Jersey Shipbuilding & Dredging Company against the said Director General, with costs to the respondent, or to direct that further proceedings be had as directed by this Court.

4. That the Court grant to the petitioner such other and further relief as may be just in the premises.

44

T. Catesby Jones,
James W. Ryan,
Proctors for Petitioner,
Office & P. O. Address,
No. 64 Wall Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York, } ss.:

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I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

T. Catesby Jones.

Subscribed and sworn to before me this
3rd day of March, 1923.

Edward A. Quinlan,
Notary Public.
(Seal)

46

Docket Entries in District Court

TRANSCRIPT OF RECORD
OF PROCEEDINGS IN DISTRICT COURT.

NEW JERSEY SHIPPING AND DREDGING COMPANY,

vs.

47 STEAMTUG "MAHANOY".

Feb. 19, 1920—Filed libel and stipulation for costs.
May 24, 1920— " order amending libel.
July 1, 1920— " answer and waiver of security for costs.
" 1, 1920— " petition.
" 7, 1920— " notice of appearance.
Aug. 31, 1920— " notice of trial and note of issue.
48 Oct. 13, 1920— " note of issue (motion to dismiss).
Jan. 11, 1922—L. Hand, J.—Case tried with 71-343 and 72-155, Libellants witness 5 ex 2.
" 12, 1922—Libellants witness 1.
Decrees for libellants in these cases.
" 11, 1922—Filed order sustaining exceptions and dismissing libel and petition as to D98RR—N. Y., N. H. & H.

Docket Entries in District Court (annexed). 49

Jan. 11.1922—Files affidavit and issued writ of habeas corpus and test.

Feb. 27, 1922—Filed interlocutory decree and reference to E. C. Rouse.

" 27, 1922—Issued citation returnable 3/10/-22.

Mar. 3, 1922—Filed citation—respondent record.

" 7, 1922—Filed notice of appearance.

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Exhibit A.

BRIEF HISTORY OF LEGISLATION AND EXECUTIVE ORDERS RELATING TO FEDERAL CONTROL OF RAILROADS.

On December 28th, 1917, pursuant to the powers conferred on him by the Act of the 29th of August, 1916 (39 Stat. 645), the President took possession and assumed control of every system of railroad transportation and
53 appurtenances thereof, located within the boundaries of the continental United States. By his proclamation issued on that day he appointed William G. McAdoo Director General of Railroads and the railroads passed into the possession, use, control and operation of such Director General, from and after 12 o'clock midnight on December 31st, 1917. The proclamation among other things provided that the Director General might perform the duties imposed upon him, so long and to such extent as he should determine, through the officers and
54 employees of the said systems of transportation. Until the Director General otherwise directed the officers and employees of the various systems were to continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies. The proclamation further provided as follows:

> "Except with the prior written assent of said Director, no attachment by mesne pro-

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cess or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine" (40 St. Pt. 2, p. 1733).

Thereafter Congress passed the Act of March 21, 1918 (40 St., P. 451, c. 25), which further regulated the subject of Federal control. Among other provisions was the following:

56

"Carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action

57

58 *Exhibit A.*

was not so transferable prior to the Federal control of such carriers; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be re-transferred to the Court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

59

On October 28th, 1918, the Director General promulgated General Order No. 50. It reads:

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper

60 that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suits in equity, and proceeding in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to

Exhibit A.

61

person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures."

62

William G. McAdoo having resigned as Director General, the President, on January 10, 1919, pursuant to the powers which had been conferred upon him by law affecting Federal control of railroads and systems of transportation, appointed Walker D. Hines as Director General and authorized him among other things "to issue any and all orders which may in any way be found necessary and expedient in connection with Federal control of such systems of transportation, railroads or inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties in relation to such Federal control as the President is by law empowered to do and perform" (40 St. 1922).

63

64 *Exhibit A.*

On January 11, 1919. Walker D. Hines as Director General of Railroads, issued General Order No. 50-A, which corresponded in all respects with General order No. 50, except that suits were no longer to be brought against William G. McAdoo but simply against the Director General of Railroads.

The act of February 28, 1920, known as "The Transportation Act, 1920," provided that Federal control should terminate on March 1, 1920, and provision was made as to the prosecution of
65 suits as follows:

CAUSES OF ACTION ARISING OUT OF FEDERAL CONTROL.

SEC. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the pro-
66 visions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now

Exhibit A.

prescribed by State or Federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. 67

(b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brough against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President sub-division (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall 68 69

be supplemented from time to time, if additional contracts are made or other agents or officers appointed.

(c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

(d) Actions, suits, proceedings, and reparation claims, of the character above

described at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). 73

(e) Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210. 74

(f) The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.

(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control. 75

76

Libel.

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of the *New Jersey Shipbuilding & Dredging Company* against the Steamtug "*Mahanoy*", her engines, etc., in a cause of damage, civil and maritime, by collision, respectfully
77 shows to the Court:—

First: The steamtug *Mahanoy* as libellant is informed and believes, is now in this District and within the jurisdiction of this Court.

Second: The New Jersey Shipbuilding & Dredging Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal place of business at Bayonne, in said State, is and at the time hereinafter mentioned was engaged in the dredging business, including the removal of
78 reefs and rocks from the beds of navigable waters, and in connection with its said business was the owner of a certain Drill Scow designated as No. 3.

Third: On or about the 2nd day of September, 1919, the said libellant entered into a contract with the United States of America, through its properly constituted officers, to excavate the bed of the East River to a depth of forty feet

below mean low water, over a certain specified area. The purpose of the contract was to remove an obstruction or reef in the river so as to permit the safe passage of deep draft vessels through the waterway. 79

FOURTH: The method of performance of said contract by the libellant was as follows:—With its said Drill Scow it drilled holes into the rock which composed the bed of the waterway. The rock was then disrupted by blasting and excavated and removed by a dredge. In order to operate said Drill Scow, it was necessary to hold her rigid and by reason of the strength of the tidal flow in order to so hold her, she was anchored with spuds and also with four anchors, extending one from each corner. 80

The Drill was placed in position by the agents, employees and servants of the United States, and was at all times and at the time hereinafter mentioned, located and operated under their orders, direction and supervision. The area to be excavated under said contract, was known and designated as the Clark Street area, and was located in the river about abreast of Old Slip, in the Borough of Manhattan, City of New York. 81

FIFTH: Upon information and belief, on or about the 7th day of November, 1919, in the due performance of the work of removing said reef, the libellant had its said Drill Scow No. 3 anchored over said reef as aforesaid, headed to the eastward about 600 feet off the Manhattan pier

82 *Libel.*

head line. In the position which she then occupied, there was room for vessels bound through the river to pass her on either side.

At about 5 P. M. on said day, while said Drill Scow was lying anchored and motionless, operating under said contract, the steamtug *Mahanoy*, with a heavy tow of loaded coal barges, arranged in tiers, on a long hawser, came out of the North River into the East River, bound upstream close to the piers on the Manhattan shore. The tide at the time was running flood; wind light; weather clear and Drill Scow
83 No. 3 had her lights properly set, brightly burning, and her crew on deck attending to their respective duties.

The *Mahanoy* shaped her course so as to pass up between No. 3 and the piers on the Manhattan side of the river, and in so doing was so carelessly and negligently handled and navigated, that she brought the middle tier of her tow into contact with the port after corner of No. 3, and thereafter under its momentum and the force of the tide, the tow swung around the Drill Scow.

84 The force of the contact was so severe that it broke and carried away the drills, drill columns, appliances and equipment; damaged her machinery and caused her other serious injuries.

SIXTH: Upon information and belief, said collision and damages were not caused or contributed to by any fault or act of negligence on the part of Drill Scow No. 3, but were solely caused by the fault and negligence of the steamtug *Ma-*

hanoy and among others in the following particulars:—

1. In that she did not have a competent master in charge carefully attending to duty.

2. In that she failed to maintain a proper lookout.

3. In that she did not observe the Drill Scow in time and take timely precautions to pass her in safety.

4. In that she did not pass up through the middle of the East River, as was her duty.

5. In that she attempted the dangerous manoeuvre of passing between the Drill Scow and the New York docks, when there was no necessity for her so doing.

6. In that she attempted to take a tow through the East River, which was too heavy and cumbersome for her to handle in safety.

7. In that she attempted to pass too close to the anchored Drill Scow at a place where there was abundance of sea room and no occasion for her so doing.

8. In that she misjudged the force and set of the tide.

88 *Libel.*

9. In that she brought her tow into contact with the Drill Scow which was at anchor and motionless.

And in other faults and acts of negligence which libellant will prove on the trial of this cause.

SEVENTH: Upon information and belief, by reason of said collision, libellant has sustained damages in the cost of repairs; cost of wrecker's services; cost of towage, cost of survey and in
89 the loss of the use of said Drill Scow during the time necessarily consumed in making said repairs in the sum of Sixty thousand ($60,000) Dollars as nearly as at present can be ascertained, payment of which has been demanded and refused.

EIGHTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law, according to the course and prac-
90 tice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the steamtug "*Mahanoy*", her engines, etc.; that all persons having any right, title or interest in her may be cited to appear and answer upon oath all and singular the premises aforesaid; that this Court may be pleased to decree payment to libellant of the amount of its claim aforesaid, together with interest and costs; that said steamtug, her engines, etc. may be con-

91

demned and sold to pay the same; and that libellant may have such other and further relief in the premises as may be just.

ALEXANDER & ASH,
Proctors for Libellant.

Southern District of New York, ss.:

92

CHARLES D. PULLEN, being duly sworn, deposes and says: That he is Vice-President of the New Jersey Shipbuilding & Dredging Company, libellant herein; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason this verification is not made by libellant in person is that it is a corporation and deponent is an officer thereof, to wit, its Vice-President as aforesaid.

93

CHAS. D. PULLEN.

Sworn to before me, this
18th day of February, 1920.

HENRIETTA LOWENTHAL,
Notary Public, N. Y. Co. #330.

(Seal)

94 **Order Amending Libel.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the U. S. Court and Post Office Building, in the Borough of Manhatan, City of New York, on the 25th day of May, 1920.

Present:

Hon. JOHN C. KNOX,
District Judge.

95

NEW JERSEY SHIPBUILDING & DREDGING CO.,
Libellant,

against

Steamtug "MAHANOY", her engines, etc.,

On reading and filing the annexed consent and on motion of Alexander & Ash, proctors for Libellant, it is

96

ORDERED, that the libel herein be amended by substituting in the title, the first paragraph and the prayer herein, Walker D. Hines, as Director General of Railroads, and agent, for and in the place of the steamtug "*Mahanoy*", her engines, etc. with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said suit, and that said libel be further amended by inserting the following additional article:

97

"NINTH: Upon information and belief, The Lehigh Valley Railroad Company and its Steamtug "*Mahanoy*" at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent, Walker D. Hines, as Director General of Railroads.

Pursuant to the provisions of Section 206 of the 'Transportation Act, 1920' the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent 98
against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.

Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its Steamtug "*Mahanoy*" as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought against the 99
latter in conformity with the previsions of said 'Transportation Act'."

JOHN C. KNOX,
U. S. D. J.

Consented to:
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent.

100

Answer.

To the Honorable, the Judges of the United States District Court for the Southern District of New York.

The answer of *John Barton Payne*, successor to *Walker D. Hines*, Director General of Railroads, as agent for the *Lehigh Valley Transportation Company*, to the amended libel and complaint of the *New Jersey Shipbuilding & Dredging Company*,

101

against

Walker D. Hines, as Director General of Railroads and Agent, in a cause of collision, civil and maritime, alleges, on information and belief, and respectfully shows to this Honorable Court as follows:

First: He admits the allegations contained in the first article of said libel.

102

Second: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the second article of said libel.

Third: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the third article of said libel.

103

FOURTH: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the fourth article of said libel.

FIFTH: He denies each and every allegation contained in the fifth article of said libel excepting insofar as the same is hereinafter admitted or modified in the ninth article of this answer.

SIXTH: He denies each and every allegation contained in the sixth article of said libel.

104

SEVENTH: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the seventh article of said libel.

EIGHTH: He admits the allegations in the first and second paragraphs of the ninth article of said libel as amended, except that he denies that the steamtug "*Mahanoy*" was owned by the Lehigh Valley Railroad Company as therein alleged and except that he denies that said steamtug "*Mahanoy*" was owned by the Lehigh Valley Railroad Company as alleged in the third 105
paragraph of said ninth article of said libel, and admits the allegations in said third paragraph of said ninth article of said libel that suit is brought in conformity with the previsions of the Transportation Act.

NINTH: He admits the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and denies each and every

other allegation contained in the eighth article of said libel.

TENTH: On the 7th day of November, 1919, the steamtug "*Mahanoy*" with seventeen (17) loaded coal boats in tow, in five tiers on two hawsers of about 40 fathoms in length, was proceeding from the vicinity of the Statue of Liberty to the East River shaping her course for about the center of the East River. The tide was flood, the weather was clear and the wind was blowing strongly from the northwest.

107 As the "*Mahanoy*" approached the mouth of the East River, her captain saw the dredge "*McMartin*" anchored near the middle of the stream, but a little nearer the New York shore. He proceeded between the "*McMartin*" and Governors Island. As he neared the "*McMartin*" he saw a drill anchored in about the center of the stream between the Wall Street ferry slip and Pier 8, Brooklyn, and a bucket dredge about 500 or 600 feet off Pier 16, Brooklyn. There were also several barges tied up at the ends of piers along the Brooklyn shore. This

108 condition rendered the channel between the drill and the Brooklyn shore so narrow that, with the flood tide also setting over toward the Brooklyn shore, it was unsafe for the "*Mahanoy*" with her tow to attempt to pass on the Brooklyn side of the drill. Her master, therefore, as soon as her tow had cleared the "*McMartin*", began to haul in toward the New York shore to pass between the drill and the New York shore.

When the "*Mahanoy*" was about abreast of Piers 5 and 6 her master noticed the tug "*At-*

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hens'' then about abreast of Pier 13 coming down the river along the New York shore with three floats and he steered to pass as close to her as was safe. At the same time looking back he noticed the tug "*Transfer No.* 20" astern of his tow, coming into the East River with a car-float on each side of her and hauling in between the "Mahanoy's" tow and the New York shore.

The master of the "Mahanoy" seeing that it would be unsafe for the "Transfer No. 20" to attempt to pass her with her tow before the "Mahanoy" and her tow had passed clear of the drill at once sounded an alarm to hold back 110
the "Transfer No. 20". The "Transfer No. 20" gave no heed to this signal but came on with unabated speed proceeding up along the port side of the "Mahanoy's" tow and at such a speed that it was apparent that she would likely get abreast of both the "Athens" and the "Mahanoy" at the same time. Seeing this situation the master of the "Mahanoy" again signalled an alarm to the "Transfer No. 20" to hold back and permit him to haul on toward the New York shore. Again the "Transfer No. 20" ignored the alarm of the "Mahanoy" but as before came on with undiminished speed and 111
crowded in between the "Athens" and the "Mahanoy" and her tow coming so close to the "Mahanoy" that her starboard float rubbed against the bow fender of the "Mahanoy".

The insistence of the "Transfer No. 20" upon passing between the "Athens" and the "Mahanoy" and her tow forced the "Mahanoy" to slow down to one bell to let the "Transfer No. 20" pass as quickly as possible. This caused the

112 "Mahanoy", in the tide then running, to lose control of her tow so that the flood tide caught the tow carrying it over towardl the Brooklyn shore, and, although as soon as the "Transfer No. 20" had cleared, the "Mahanoy" hauled in at once toward the New York shore, at full speed ahead in an effort to pull her tow clear of the drill, she was unable to do so and the tide brought her tow into collision with the drill doing considerable damage to said drill and to several of the boats of the "Mahanoy's" said tow.

113 ELEVENTH: That the collision and alleged damages were not caused nor contributed to by any fault or neglect on the part of the steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her, in the following, among other particulars, which will be pointed out at the trial of this action:

114 1. In that those in charge of the steamtug "Transfer No. 20" were incompetent and inattentive to their duties.

2. In that those in charge of the steamtug "Transfer No. 20" failed to maintain a proper and vigilant lookout.

3. In that those in charge of the steamtug "Transfer No. 20" disregarded all signals of the "Mahanoy".

Answer.

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4. In that those in charge of the steamtug "Transfer No. 20" under the conditions which must have been apparent to them, persisted in crowding between the "Athens" and the "Mahanoy" instead of giving these tugs and their tows time to pass each other and to clear the drill.

5. In that those in charge of the steamtug "Transfer No. 20" failed to take properly into consideration the movements of the tide.

116

6. In that those in charge of the steamtug "Transfer No. 20" crowded in between the "Mahoney" and the "Athens" and their tows and forced the "Mahanoy" to slow down so that the tide could and did carry her tow upon the drill.

7. In that those in charge of the steamtug "Transfer No. 20" did nof pass up the river between the Brooklyn shore and the Drill Scow No. 3.

8. In that those in charge of the steamtug "Transfer No. 20" failed to slacken her speed on approaching the "Mahanoy". 117

9. In that those in charge of the "Transfer No. 20" proceeded at too great a speed.

10. In that those in charge of the steamtug "Transfer No. 20" being the overtaking boat failed to keep her out of the way of the "Mahanoy" and her tow.

118 *Answer.*

11. In that those in charge of the steam-tug "Transfer No. 20" did nothing to avoid the accident.

TWELFTH: As a further and separate defense to the said libel, respondent alleges that your respondent is entitled to limit his liability to the value of the said tug and its pending freight, if any, and respondent reserved all of his rights to set up his right to limitation by a petition for limitation of liability, filed pursuant to the Revised Statutes of the United States and the
119 Acts of Congress amendatory and supplemental thereto, if it should be advised that such a proceeding is necessary.

THIRTEENTH: All and singular the premises are true.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent,
64 Wall Street,
120 Borough of Manhattan,
City of New York.

121

State of New York, }
County of New York, } ss.:

T. Catesby Jones, being duly sworn, deposes and says:

That he is a member of the firm of Harrington, Bigham & Englar, proctors for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

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That the reason this verification is made by deponent and not by respondent, is that respondent is not now within this jurisdiction.

That the sources of deponent's information and the grounds of his belief are statements made by the respondent and documents in the possession of deponent.

T. Catesby Jones.

Sworn to before me, this
29th day of June, 1920.

123

P. J. R. McEntegart,
Notary Public, New York County.
New York County Clerk's No. 120.
New York Register's No. 2102.
Certificate filed in Kings Co.
Clerk's No. 47; Register's No. 2043.
Commission expires March 30, 1922.

(Notarial Seal)

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Petition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
125
WALKER D. HINES, as Director General of Railroads and Agent,
Respondent.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

The Libel and Petition of *John Barton Payne*, successor to Walker
126 D. Hines, Director General of Railroads, as Agent for the Lehigh Valley Transportation Company, against *John Barton Payne*, Director General of Railroads, as Agent for the *New York, New Haven & Hartford Railroad Company*, in the action of the *New Jersey Shipbuilding & Dredging Company* against

Petition.

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Walker D. Hines, as Director General of Railroads, and agent, in a cause of collision, civil and maritime, alleges on information and belief, and respectfully shows to this Honorable Court as follows:

FIRST: That at and during all the times hereinafter mentioned, the Lehigh Valley Transportation Company was and still is a foreign corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, 128
having an office and place of business at 143 Liberty Street, in the Borough of Manhattan, City and County and State of New York, and engaged in the business of transportation of merchandise by water in and about the harbor of New York and is and at all the times hereinafter mentioned was the owner of and operating the steamtug "Mahanoy".

SECOND: That at and during all the times hereinafter mentioned, the New York, New Haven & Hartford Railroad Company, was and still is a foreign corporation organized and 129
existing under and by virtue of the laws of the State of Connecticut, with an office and place of business in the City of New Haven in the State of Connecticut, and also in the Borough of Manhattan, City, County and State of New York and engaged in the business of transportation for hire.

THIRD: That at and during all the times hereinafter mentioned, the said New York, New

Haven & Hartford Railroad Company was and still is the owner of the steamtug "Transfer No. 20".

FOURTH: That heretofore by certain proclamations of the President of the United States of America and certain Acts of Congress, said railroads and carriers, including the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, were placed under the direction and control of the Director General of Railroads and a Director General of Railroads was duly appointed and qualified and entered upon the discharge of his duties as such and during all the times hereinafter mentioned was in charge of the operation and control of all the property of the said Lehigh Valley Transportation Company used for transportation purposes including the steamtug "Mahanoy" and of all the property of the New York, New Haven & Hartford Railroad Company used for transportation purposes including the steamtug "Transfer No. 20". That thereafter John Barton Payne was appointed and designated Director General of Railroads as agent for the said Lehigh Valley Transportation Company and New York, New Haven & Hartford Railroad Company against whom actions at law might be brought based on causes of action arising out of the operation by the President under the provision of the Federal control Act of said railroads or systems of transportation, and duly qualified and is now acting as such in this district and as such is within the jurisdiction of this Honorable Court.

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FIFTH: That heretofore and on or about the 19th of February, 1920, a libel was filed in this Court by the New Jersey Shipbuilding & Dredging Company against the steamtug "Mahanoy", her engines, etc., praying that process may issue against the steamtug "Mahanoy", her engines, etc. and that all persons having any right, title or interest in said steamtug "Mahanoy" be cited to appear and answer the said libel and that the Court also decree to the libellant damages in the sum of Sixty thousand ($60,000.) Dollars alleged to have been sustained by the drill scow "No. 3" belonging to said libellant on or about the 7th day of November, 1919. In said libel it was alleged that said damages sustained by said drill scow "No. 3" were due to the fault and negligence on the part of the steamtug "Mahanoy" in the following respects:

134

1. In that she did not have a competent master in charge carefully attending to duty.

2. In that she failed to maintain a proper lookout.

3. In that she did not observe the drill scow in time and take timely precautions to pass her in safety.

135

4. In that she did not pass up through the middle of the East River, as was her duty.

5. In that she attempted the dangerous manoeuvre of passing between the drill

136 *Petition.*

scow and the New York docks, when there was no necessity for her so doing.

6. In that she attempted to take a tow through the East River, which was too heavy and cumbersome for her to handle in safety.

7. In that she attempted to pass too close to the anchored drill scow at a place where there was abundance of sea room and no occasion for her so doing.

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8. In that she misjudged the force and set of the tide.

9. In that she brought her tow into contact with the drill scow which was at anchor and motionless.

SIXTH: Thereafter the said libel, filed as aforesaid against the steamtug "Mahanoy" in rem, was amended so as to make said libel in personam against Walker D. Hines, Director General of Railroads as agent.

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SEVENTH: Your petitioner alleges that the true facts and circumstances of the said collision and damages were as follows:

On the 7th day of November, 1919, the steamtug "Mahanoy" with seventeen (17) loaded coal boats in tow, in five tiers on two hawsers of about 40 fathoms in length, was proceeding from the vicinity of the Statue of Liberty to the East River shaping her course for about the center

of the East River. The tide was flood, the weather was clear and the wind was blowing strongly from the northwest. 139

As the "Mahanoy" approached the mouth of the East River her captain saw the dredge "McMartin" anchored near the middle of the stream but a little nearer the New York shore. He proceeded between the "McMartin" and Governors Island. As he neared the "McMartin" he saw a drill anchored in about the center of the stream between the Wall Street ferry-slip and Pier 8, Brooklyn, and a bucket dredge about 500 or 600 feet off Pier 16, Brooklyn. There were also several barges tied up at the ends of piers along the Brooklyn shore. This condition rendered the channel between the drill and the Brooklyn shore so narrow that, with the flood tide also setting over toward the Brooklyn shore, it was unsafe for the "Mahanoy" with her tow to attempt to pass on to the Brooklyn side of the drill. Her master, therefore, as soon as her tow had cleared the "McMartin", began to haul in toward the New York shore to pass between the drill and the New York shore. 140

When the "Mahanoy" was about abreast of Piers 5 and 6 her master noticed the tug "Athens" then about abreast of Pier 13 coming down the river along the New York shore with three floats and he steered to pass as close to her as was safe. At the same time looking back he noticed the tug "Transfer No. 20" astern of his tow, coming into the East River with a car float on each side of her nd hauling in between the "Mahanoy's" tow and the New York shore. The master of the "Mahanoy" seeing that it would 141

142 *Petition.*

be unsafe for the "Transfer No. 20" to attempt to pass her with her tow before the "Mahanoy" and her tow had passed clear of the drill at once sounded an alarm to hold back the "Transfer No. 20". The "Transfer No. 20" gave no heed to this signal but came on with unabated speed proceeding up along the port side of the "Mahanoy's" tow and at such a speed that it was apparent that she would likely get abreast of both the "Athens" and the "Mahanoy" at the same time. Seeing this situation the master of the "Mahanoy" again signalled an alarm to the
143 "Transfer No. 20" to hold back and permit him to haul on toward the New York shore. Again the "Transfer No. 20" ignored the alarm of the "Mahanoy" but as before came on with undiminished speed and crowded in between the "Athens" and the "Mahanoy" and her tow coming so close to the "Mahanoy" that her starboard float rubbed against the bow fender of the "Mahanoy".

The insistence of the "Transfer No. 20" upon passing between the "Athens" and the "Mahanoy" and her tow forced the "Mahanoy" to slow down to one bell to let the "Transfer No.
144 20" pass as quickly as possible. This caused the "Mahanoy", in the tide then running, to lose control of her tow so that the flood tide caught the tow carrying it over toward the Brooklyn shore, and, although as soon as the "Transfer No. 20" had cleared, the "Mahanoy" hauled in at once toward the New York shore at full speed ahead in an effort to pull her tow clear of the drill, she was unable to do so and the tide brought her tow into collision with the drill, do-

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ing considerable damage to said drill and to several of the boats of the "Mahanoy's" said tow.

EIGHTH: That the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the said steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her, in the following, among other particulars, which will be pointed out at the trial of this action:

146

(1) In that those in charge of the steamtug "Transfer No. 20" were incompetent and inattentive to their duties.

(2) In that those in charge of the steamtug "Transfer No. 20" failed to maintain a proper and vigilant lookout.

(3) In that those in charge of the steamtug "Transfer No. 20" disregarded all signals of the "Mahanoy".

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(4) In that those in charge of the steamtug "Transfer No. 20" under the conditions which must have been apparent to them, persisted in crowding between the "Athens" and the "Mahanoy" instead of giving these tugs and their tows time to pass each other and to clear the drill.

(5) In that those in charge of the steamtug "Transfer No. 20" failed to take prop-

148 *Petition.*

erly into consideration the movements of the tide.

(6) In that those in charge of the steamtug "Transfer No. 20" crowded in between the "Mahanoy" and the "Athens" and their tows and forced the "Mahanoy" to slow down so that the tide could and did carry her tow upon the drill.

(7) In that those in charge of the steamtug "transfer No. 20" did not pass up the
149 river between the Brooklyn shore and the drill scow "No. 3".

(8) In that those in charge of the steamtug "Transfer No. 20" failed to slacken her speed on approaching the "Mahanoy".

(9) In that those in charge of the steamtug "Transfer No. 20" proceeded at too great a speed.

(10) In that those in charge of the steamtug "Transfer No. 20" being the overtak-
150 ing boat, failed to keep her out of the way of the "Mahanoy" and her tow.

(11) In that those in charge of the steamtug "Transfer No. 20" did nothing to avoid the accident.

NINTH: That by reason of the premises the said John Barton Payne, Director General of Railroads as agent aforesaid, of the New York

New Haven & Hartford Railroad Company is wholly and solely liable for whatever amount may be decreed to the libellant herein, if any, and is therefore a necessary and proper party to this suit and should be proceeded against herein. 151

TENTH: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioner prays that a monition in due form of law, according to Admiralty and Maritime jurisdiction, issue against the said John Barton Payne, Director General of Railroads, as agent as aforesaid of the New York, New Haven & Hartford Railroad Company, and that he be cited to appear and answer on oath all and singular the matters in the libel and petition herein and that if any damages should be decreed to the libellant herein then that the decree may be entered herein against the said John Barton Payne, Director General of Railroads, as agent for the said New York, New Haven & Hartford Railroad Company and that your petitioner may have such other and further relief as may be just and proper in the premises. 152 153

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner,
Office and Post Office Address,
No. 64 Wall Street,
Borough of Manhattan,
New York iCty.

154 *Petition.*

State of New York, }
County of New York, } ss.:

T. Catesby Jones, being duly sworn, deposes and says; That he is a member of the firm of Harrington, Bigham & Englar, proctors for the respondent herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by
155 deponent and not by respondent, is that respondent is not now within this jurisdiction.

That the sources of deponent's information and the grounds of his belief are statements made by the respondent and documents in the possession of deponent.

T. Catesby Jones.

Sworn to before me this
29 day of June, 1290.

P. J. R. McEntegart,
156 Notary Public, New York County,
New York County Clerk's No. 120,
New York Register's No. 2102,
Certificate Filed in Kings Co.,
Clerk's No. 47, Register's No. 2043,
Commission Expires March 30, 1922.

(Notarial Seal)

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Notice of Appearance.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
WALKER D. HINES, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),
Respondent,
and
JOHN BARTON PAYNE, Director General of Railroads as Agent for The New York, New Haven and Hartford Railroad Company,
Respondent-Impleaded.

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SIRS:

PLEASE TAKE NOTICE that the respondent, JOHN BARTON PAYNE, Director General of Railroads as Agent for the New York, New Haven and Hartford Railroad Company, impleaded under the 59th Rule, appears in the above entitled proceed- and that I am retained as proctor for him there-

160 *Notice of Appearance.*

in and demand that a copy of all papers in this proceeding be served on me at my office in the Grand Central Terminal, Borough of Manhattan, City of New York.

Dated, New York City, July 6, 1920.

Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent-Impleaded,
Office and Post Office Address,
161 Room 3610 Grand Central Terminal,
Borough of Manhattan,
City of New York.

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Petitioner,
64 Wall Street,
New York City.

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Notice of Motion.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug "MAHANOY", 164
Respondent,

and

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the New Haven "TRANSFER No. 20", 165
Respondent.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Bill of Exceptions, the respondent. John Barton Payne, will move this Court at a Stated Term

166 *Notice of Motion.*

thereof for the hearing of motions to be held in Room 235, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 15th day of October, 1920, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order dismissing the libel and petition of John Barton Payne, filed herein, but without costs, and for such other and further relief as the Court may deem proper.

Dated, New York City, October 7th, 1920.

167 Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Libellant and Petitioner,
64 Wall Street,
New York City.

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Bill of Exceptions.

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UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug "MAHANOY",
Respondent,

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and

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the New Haven "TRANSFER No. 20",
Respondent.

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The respondent, JOHN BARTON PAYNE, as successor to WALKER D. HINES, Director General of Railroads and Agent, on account of New Haven "Transfer No. 20", hereby excepts to the libel and petition of JOHN BARTON PAYNE, as successor to WALKER D. HINES, Director General of Railroads and Agent, on account of the Lehigh

172 *Bill of Exceptions.*

Valley Tug "Mahanoy", filed herein, on the following grounds:

FIRST: That at the time of the alleged collision on November 7th, 1919, both the Lehigh Valley tug "Mahanoy" and the New Haven "Transfer No. 20" were solely under the control and management of and were being operated solely by Walker D. Hines, Director General of Railroads, and that for this reason no cause of action ever accrued to the said Walker D. Hines, operating the said tug "Mahanoy" as against
173 the said Walker D. Hines, operating the New Haven "Transfer No. 20", or against John Barton Payne, his successor.

SECOND: On the ground that the said Walker D. Hines, or his succesor, John Barton Payne, is not entitled to maintain said libel and petition against the said Walker D. Hines, or his successor, John Barton Payne, on account of the said New Haven "Transfer No. 20" and no cause of action now exists or ever has existed in favor of said libellant and petitioner for or by reason of any matter, or thing connected with
174 the operation of said New Haven "Transfer No. 20".

THIRD: Upon the ground that under and pursuant to the Acts of Congress respectively approved August 29th, 1916, March 21st, 1918, and February 28th, 1920, and the proclamations of the President issued thereunder, the United States has duly made provision for the payment out of the Treasury of the United States of all judgment, decrees and awards entered or thereafter to be entered against the Director General

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of Railroads as Agent, under the Transportation Act of 1920, in satisfaction of such judgments, decrees or awards resulting from causes of action which arose out of the possession, use or operation by the President of the railroads or systems of transportation of carriers under the aforesaid statutes; and it is a matter of common knowledge that pursuant to the aforesaid statutes, orders and regulations, any decree for damages to which the original libellant herein may be entitled will necessarily be satisfied pursuant to law out of a common fund belonging to the United States and either derived from the 176
operation of said roalroads, including the transportation system of the Lehigh Valley Transportation Company, the Lehigh Valley Railroad Company and The New York, New Haven and Hartford Railroad Company, or out of the revolving fund or funds appropriated by the aforesaid Acts.

Fourth: That the said libel and petition of John Barton Payne is unauthorized and unwarranted by law or by any of the aforesaid statutes or the orders and regulations of the United States Railroad Administration pursuant thereto. 177

Wherefore, respondent prays that the said libel and petition be dismissed but without costs.

Charles M. Sheafe, Jr.,
Proctor for Respondent,
John Barton Payne, as successor, etc.,
Office and Post Office Address,
Room 3610, Grand Central Terminal,
Borough of Manhattan,
City of New York.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY SHIPBUILDING AND DREDGING COMPANY,

vs.

TUG "MAHANOY,

179 W. J. FEE COAL CO.,

vs.

DIRECTOR GENERAL OF RAILROADS, (LEHIGH VALLEY RAILROAD COMPANY).

JAMES McWILLIAMS BLUE LINE,

vs.

DIRECTOR GENERAL OF RAILROADS, (LEHIGH VALLEY RAILROAD COMPANY).

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Before: HON. LEARNED HAND, *D. J.*

January 11, 1922, 3:30 p. m.

APPEARANCES:

ALEXANDER & ASH, By Peter Alexander, Esq., for N. J. Shipbuilding & Dredging Co.,

Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct. 181

BIGHAM, ENGLAR & JONES, By Henry B. Potter, for all respondents.

PARK & MATTISON, By Anthony V. Lynch, Jr., Esq., for W. J. Fee Coal Co.

HERBERT GREEN, Esq., for James McWilliams Blue Line.

Counsel state their claims.

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CHARLES D. PULLEN, a witness called on behalf of the New Jersey Shipbuilding & Dredging Co., being duly sworn, testified as follows:

Direct Examination by Mr. Alexander:

Q. Mr. Pullen, where do you reside? A. 1604 Crotona Park, East, New York City.

Q. Are you connected with the New Jersey Shipbuilding & Dredging Company? A. Vice-President and treasurer. 183

Q. Were you vice-president and treasurer of that company on November 7, 1919? A. I was.

Q. In what state is that company incorporated? A. In the State of New Jersey.

Q. What business is it engaged in? A. Dredging, rock excavation.

Q. Do you know the drill scow No. 3? A. Very well.

184 *Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct.*

Q. Who was the owner of that drill scow on November 7, 1919? A. The New Jersey Shipbuilding & Dredging Co.

Q. Did your company have a contract with the United States with reference to the excavation of rock in the East River? A. It did.

Q. What is known as the Clark Street area? A. Yes.

Q. Is that the area marked on the blueprint which I show you? A. It is the official map of the War Department with the area marked.

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Mr. Alexander: I offer it in evidence.

Received and marked Libellants Exhibit 1.

Q. I show you, Mr. Pullen, a contract, and I ask you to state whether or not that was a contract made with the Government covering the excavation on the area shown on blueprint Exhibit 1? A. This is the original contract signed by Col. Edward Burr, for the United States Government.

Q. And your company? A. And my company.

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Mr. Alexander: May I introduce a copy instead of the original.

The Court: Yes.

Q. Where was your drill scow on the afternoon of the 7th of November, 1919? A. Working in section 4 on the area named.

Q. You were not on the drill scow at the time of the accident? A. No, sir.

Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct. 187

Q. What depth of channel were you excavating at that time? A. The channel to be forty foot, with two foot over-depth, forty-two foot.

Q. Do you know how your drill scow was made fast in the channel? A. Four two-ton anchors, 1¾" chains and three steel spuds, 32" square, 65" long.

Q. How were they put down? On what part of the dredge are they put down into the river? A. They are put down through heavy castings through the hull of the vessel and from the sides, front and aft. 188

Q. One on each side and one on the stern? A. Yes, sir, on this particular drill.

Q. The drill scow has an equipment for drilling? A. Three drills.

Q. That is the bow end? A. That is the bow end.

Q. Do you know whether or not that vessel sustained any damage on November 7, 1919?

The Court: Now a good deal of this you need not prove.

Mr. Potter: You have denied in the Fifth Article of your answer, every allegation 189 in the Fifth article of the libel, except as admitted or modified in the Ninth Article of the Answer.

That is a mistake, that is the Tenth.

The Court: So that you may take the whole statement in the Tenth as in proof of your Fifth. You have read that. Does not that give a complete story such as you are content with?

190 Mr. Alexander: Yes, sir. And there is no charge of negligence against the drill scow.

The Court: Then haven't you proved your case, now?

Mr. Alexander: I thought I might bring the superintendent, who was on board at the time, to testify as to the contract.

The Court: Don't they admit the contract in the Tenth Article?

191 Mr. Potter: It does on page 5, in the first three lines on the top of page 6.

Mr. Alexander: Yes, it alleges the contact. That covers our case.

No Cross-Examination.

The Court: Now that proves all your case.

Mr. Alexander: Yes, I think it does.

192 Mr. Lynch: I am in this position. Through Mr. Potter's kindness, he was going to concede incorporation and ownership, and I didn't bring Mr. Fee down, as he was planning to take a trip to California. I can prove ownership, but not incorporation by my master.

Mr. Potter: I would like to withdraw from that agreement.

Mr. Lynch: I will get Mr. Fee down tomorrow morning.

Mr. Potter: I did make that agreement, but I feel that I will have to withdraw it.

193

Mr. Lynch: Then I will have to get Mr. Fee tomorrow morning.

The Court: Can't you get a certified copy of the Letters of Incorporation tomorrow morning?

Mr. Lynch: I think it would be better to get Mr. Fee down here.

JOHN JOHNSON, a witness called on behalf of the Fee Coal Company, being duly sworn, testified as follows:

194

Direct Examination by Mr. Lynch:

Q. Captain Johnson, on November 7, 1919, were you master of the boat William J. Fee? A. Yes, sir.

Q. Do you know who she is owned by? A. Mr. William Fee.

Q. On November 7, 1919, was your boat in tow of the Lehigh Valley tug Mahanoy? A. Yes, sir.

Q. Was your boat in contact, in collision, with a dredge or a drill in the East River, on November 7, 1919? Did it hit it? (No answer).

195

The Court: Did your boat hit the drill?

Witness: No, sir, not on November 7.

The Court: What date was it?

Witness: It was November 5, 1919.

Mr. Lynch: I will have to get the original protest. He stated it was November 7.

196 *John Johnson—For Fee Coal Company—Direct*

Q. In what position in the tow was your boat? A. My boat was in the third tier.

Q. On which side of the tow? A. The starboard side of the tow.

Q. She was the outside boat at the time you struck the drill? A. She was the second boat inside—

Q. At the time she struck the drill was she the outside boat? A. Yes, sir, at that time she was the outside boat.

Q. Was some demage sustained by her? A.
197 The whole side was stove in her.

Q. Where was she taken after the collision? A. Between Piers 7 and 8.

Q. Did she sink? A. Right off, quick.

The Court: She was in tow of the tug Mahanoy?

Witness: Yes, sir.

The Court: You had come up from Port Reading?

Witness: No, sir, from the Perth Amboy stakes. Oh no, Pennsylvania stakes.

The Court: And you came up through
198 the Bay?

Witness: Yes, sir.

The Court: How many were there in the tow after you left Staten Island?

Witness: We were eighteen boats.

The Court: You rounded at the Battery, and were coming up the East River?

Witness: No, we first landed at Liberty Light and hung there while the Port Reading tug, the Wyomissing, took out the Dickinson that was tied on the side of me.

199

The Court: That left you seventeen?

Witness: That left us seventeen, yes, sir.

Cross Examination by Mr. Green:

Q. When the boats hit that dredge, what happened, was the tow broken up? A. Which barge? My boat?

Q. When the tow hit the dredge, was the tow broken up by it? A. Sure, sir, right off, everything went to pieces, all apart.

200

Q. The boats all banged against one another? A. They certainly did, yes. The tide was flood and they run up and banged everything.

Mr. Potter: No cross examiation.

William Lyle, a witness called on behalf of the McWilliams Blue Line, being duly sworn, testified as follows:

201

Direct Examination by Mr. Green:

Q. On November 7, 1919, you were captain of the barge S. E. Vincent? A. I was, yes, sir.

Q. Owned by the James McWilliams Blue Line? A. Yes, sir.

Q. And you had been captain of that boat for some time? A. About a year.

Q. You were in that tow that went up the East River that day? A. Yes, sir.

Q. In tow of the Mahanoy? A. Yes, sir.

Q. Where was your boat in the tow? A. The second tier, behind the hawser boat on the starboard side.

Q. You were the outside boat on the starboard side in the second tier? A. Yes, sir.

Q. Did your boat hit that dredge? A. She did.

Q. What part of your boat? A. Just aft of midships, forward of the cabin.

203 Q. Was she damaged? A. She was, threw everything off, threw the deck in.

The Court: You sank at Whitestone next morning?

Witness: No, sir, not my boat.

Q. When the tow hit the dredge was it broken up? A. Yes, sir.

Q. What happened to the boats? A. They all pounded together there.

Q. How long did that last? A. Well, until the assistance came to help pull us out, maybe half

204 an hour we were bumping around that way.

Q. And then some tugs got control of the tow? A. Yes, sir.

Q. And went on with it? A. Yes, sir.

Q. Now the tow was taken to Newtown Creek, was it? A. Yes, sir.

Q. After this accident? A. Yes, sir.

Q. And after the tugs resumed the towing? A. Yes, sir.

William Lyle—For McWilliams Blue Line—Direct. 205

Q. What time did you get there? A. I should judge somewhere around seven o'clock.

Q. How long did you stay there? A. Sometime I think around the morning, one o'clock, somewhere around there.

Q. Early in the morning? A. Early in the morning.

Q. What boat took your boat in tow? A. The John Garrett.

Q. And what other boats? A. The Edgar Jones and the Daniel R. Roe.

206

The Court: Three boats in all?
Witness: Three boats in all.

Q. Where did she take them to? A. The stakeboat, Whitestone.

Q. How was that tow arranged? A. I was in the hawser tier on the starboard side. The Edgar Junior was on the port hand, and the Daniel Roe was under my stern.

Q. And on your way to Whitestone, did you notice whether or not the Captain of the Daniel Roe was pumping? A. He was.

Q. Did you speak to him about it? A. I did. 207
I offered to give him a hand and he said he could handle it himself.

Q. What time did you get to Whitestone? A. Somewhere around three in the morning, I should think, three or half past, something like that.

Q. Were you in bed when you got there? A. No, sir.

208 *William Lyle—For McWilliams Blue Line—Cross.*

Q. Were you on deck? A. I was on deck, yes, sir.

Q. Did you notice anything peculiar about the Daniel R. Roe? A. I saw the captain pumping, and I asked him if he was leaking bad.

Q. After you got to Whitestone? A. After we got to Whitestone.

Q. Did you notice anything about his boat, anything happen to it? A. No, just at that moment.

209 Q. Later on? A. Later on I noticed his decks were under water.

Q. What time was that? A. I should judge that was around five o'clock.

Q. And then what happened? A. The John Garrett came and shoved her on the flats after she was filled with water.

Q. She sank? A. She sank.

Q. Your boat and the Roe were both loaded with coal? A. Yes, sir.

Q. What kind of coal? A. I think I had nut coal on.

Q. Hard coal? A. Hard coal.

210 Q. Did the Roe have hard coal also? A. She did.

Cross Examiation by Mr. Lynch:

Q. Did you see the boat William J. Fee in the same tow? A. She was under my stern.

Q. And this accident happened on what date? A. The 7th of November.

William Lyle—For McWilliams Blue Line—Cross.

211

Mr. Lynch: I think that covers me on the date.

The Court: Yes.

By Mr. Potter:

Q. Did you come into collision with any other boat after the occurrence you have just narrated? A. What is that?

Q. Did your boat come into collision with any other boat after the alleged collision with the drill? A. No, sir.

212

Q. Are you sure you were on the boat during this time? A. I certainly was.

Q. Where was your boat in the tow? A. I was in the second tier from the hawser, I had my wife standing forward and she was going to get off on the other boat, I saw we was going to hit the drill before we hit it.

Mr. Green: Do you want me to put on any more witnesses as to our boat sinking as the result of the collision?

Mr. Potter: I am afraid we are going to get some collateral issues here. I do not know what happened after the collision with the drill.

213

Mr. Green: He testified that she sank.

Mr. Potter: The question has been raised whether she sank as the result of coming in contact with the drill.

214 *John Greenwood—For McWilliams Blue Line—Direct.*

JOHN GREENWOOD, a witness called on behalf of the James McWilliams Blue Line, being duly sworn, testified as follows:

Direct Examination by Mr. Green:

Q. Where do you live? A. New Suffolk, Long Island.

Q. You don't work for the James McWilliams
215 Blue Line, do you? A. Not at the present time.

Q. You are a son of John Greenwood? A. Yes, sir.

Q. Your father used to work for the James McWilliams Blue Line? A. Yes, sir.

Q. And he was captain of the Roe? A. He was captain of the Roe.

Q. Where is he now? A. In California, he went there eighteen months ago.

Q. Has he been back since? A. No, sir.

Q. How old is he? A. Abount seventy-four years old.

Q. You think he will stay there the rest of his
216 life? A. Yes, sir.

Q. He is out there with relatives? A. Yes, sir.

The Court: The question you raise, Mr. Potter, is a question of the amount of damages anyway, so that I should not decide it here. They do not dispute that you were injured, but how much the in-

Daniel R. Roe—For McWilliams Blue Line—. Direct. 217

juries were. That will go before the Commissioner.

Mr. Green: Then my right is reserved?

The Court: Oh, yes, the extent of your damages you will have to prove before a Commissioner.

Daniel R. Roe, a witness called on behalf of the James McWilliams Blue Line, being duly sworn, testified as follows: 218

Direct Examination by Mr. Green:

Q. You are secretary of the James McWilliams Blue Line? A. Yes, sir.

Q. And you have been for how many years? A. Four years.

Q. Do you remember the sinking of the boat D. R. Roe? A. Yes, sir.

Q. You had charge of everything in connection with her repair, and so on? A. Yes, sir. 219

Q. Who owned the D. R. Roe and the S. E. Vincent? A. The James McWilliams Blue Line, Incorporated.

Q. And it is incorporated under the laws of what State? A. New Jersey.

No Cross Examination.

220

The Court: That is the case of the libellants.

Mr. Potter: Is it agreeable to have the case go over to tomorrow so that someone representing the Director General may make whatever statement, or objection, there may be so that we may have a record on this point?

The Court: Yes. If you have any testimony or evidence of any kind in traverse of the issues which have been now supported by the libellants proof, I would

221

like to have that in tonight, so that the only thing to take up to-morrow will be the validity of your pleas.

Mr. Green: I have nothing to deny.

The Court: The case is closed on the allegations in the libel. Tomorrow morning the question of the validity and proof of the respondents' defense will be taken up and you will be allowed to put in your proof of incorporation, Mr. Potter. If you want to bring in the proctor for the Director General I will be pleased to hear

222

him at any length he wishes.

The Court states that the witnesses need not come back tomorrow.

John L. Fee—For W. J. Fee Coal Company—Direct. 223

January 12, 1922.

Case resumed.
Same appearances.

JOHN L. FEE, a witness called on behalf of W. J. Fee Coal Company, being duly sworn, testified as follows:

224

Direct Examination by Mr. Lynch:

Q. Are you an officer of William J. Fee Coal Company? A. I am.

Q. Is the William J. Fee Coal Company a corporation? A. It is.

Q. Incorporated under the laws of what State? A. New York.

Q. Where is your main office? A. Mount Vernon.

Q. On November 7, 1919, was the William J. Fee Coal Company the owner of the coal boat William J. Fee? A. They were. 225

No Cross Examination.

The Court: Mr. Potter was to advise with the general counsel of the Director General.

Mr. Thompson states that he represents the Director General.

226

The Court: You know the situation?

Mr. Thompson: Yes, sir, I will make a statement after Mr. Potter gets through.

Mr. Potter: Respondent offers to prove that the collision and alleged damages were not caused or contributed to by any fault or neglect on the part of the steamtug "Mahanoy", or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug Transfer No. 20 and those in charge of her.

The Court: You are willing to concede that the No. 20 was at that time part of the equip-

227 ment of the New York, New Haven & Hartford Railroad, and that that was in the possession and control of the Director General?

Mr. Potter: Yes, sir. Now, as I understand it, you will exclude all that evidence?

The Court: Yes, on the ground that it does not vary the liability of the Director General that the only respondent in this case is the Director General, who at that time was in control of both railroads in question and both tugs, that the Director General was operating then a single system of common carriage by means of the equipment of both railroads, and that therefore

228 it makes no difference whether the negligence which caused the injury was due to the crew of the Mahanoy or the crew of the New Haven boat; in either case the injury was due to an agent of the Director General, who, as I have said, was a single carrier. That being true, I find that the testimony is irrelevant to the issue just as irrelevant as though in the case of a private corporation it was urged that one set of servants was innocent of negligence which

caused damage to an outsider, that negligence arising from another set of servants; just as much as though two tugs of the New Haven Railroad or two tugs of the Lehigh Valley Railroad were involved, I might find one was quite innocent and the other was at fault, but it would make no difference in the disposition of the case. The libellant has been injured by one of two sets of servants concededly, and that would be enough to charge the common carrier with liability. 229

Mr. Potter: May I have an exception?

The Court: Yes. 230

The Court: Of course, that is a provisional ruling until I have heard you and Mr. Thompson.

Mr. Potter: Yes, sir. We also have in the twelfth article of our libel in each of the cases reserved the right to limit our liability to the value of the tug, Mahanoy.

The Court: I will reserve that. That point will arise only in the event that the amount of the damages is larger than the smaller of the two values, the Mahanoy and the Transfer No. 20. If it turns out that the aggregate of damages is larger than the value of the less valuable of the two tugs, that question will arise, and will necessarily come up for determination. I will hear the libellants if they have anything to say on that question. 231

Mr. Alexander: I think that if that question is reserved it will be satisfactory. I had hoped that Mr. Potter could bring both of the tugs in, and we could show that they were both at fault. I shall be glad to have them both in, but I agree that the question of limitation should be re-

served until the determination of the damages. I cannot tell now, nor can the court tell, which tug is at fault, and on which he can limit his liability.

(Discussion.)

The Court: I will reserve this until the damages are proved.

(Statement by Mr. Thompson for the Director-General).

233

The Court: At any time, this can be put in the form of an arbitration, so that the underwriters can be concluded. If they are willing to stand by the decision, I will take it up as an independent arbitration. I will not take it up where I have nothing to bind the parties but a conference with their attorneys.

Mr. Thompson: It would be a separate proceeding and will not be mentioned in the decree in this particular case.

The Court: I think it clearly irrelevant to the decree.

234 Mr. Thompson: I think it can be worked out. I will try to get the various attorneys together.

The Court: If they will make it a binding arbitration, I will hear it.

Mr. Thompson: Now for the purpose of the record I want to make an objection to the jurisdiction of the court to hear and determine this action as an action in personam against the Director General as agent under Section 206 of the Transportation Act, on the ground that

there has been no service such as is provided in Section 206 of the Transportation Act to bring the Director General as agent into court, and upon the further ground that this is in effect an action against the sovereign, and the consent to sue the sovereign is embraced in Section 206 of the Transportation Act of 1920, and that the libellant has not followed the procedure outlined in that section of the Act in order to bring the sovereign before the court. 235

The Court: Do you wish to be heard on that?

Mr. Thompson: Yes, sir. 236

Mr. Green: That would go to the validity of our decrees.

The Court: Yes. I will hear them on it.

(Discussion.)

The Court: I will overrule that.

Mr. Thompson: Exception.

The Court: The Proctor for the Director General has raised the question that under Section 206-b no suit can be started except by the service of a monition. Now it appears in this case that there was no monition ever served on the Director General or on any agent of any of the companies authorized to receive process by the contracts specified in Section 206-b. The defendant was brought into court by an appearance of Harrington, Bigham & Englar, its proctors, and this appearance it is conceded was authorized if the Director General might appear voluntarily by any attorney like any other party; it was not authorized, however, if the Director Gen- 237

eral has no authority to authorize a proctor t
appear for him in a suit in admiralty in whic
there has been no service of process. Therefor
the question of the jurisdiction of this court i
squarely raised by the Director General and in
volves the construction of Section 206-b, and tha
question in short is just this: Did Congress
when it said that process might be served upo
the Director General or the agents appointe
by him, intend to limit the beginning of suit
to the formal service of process, or is it to b
interpreted as authorizing the Director Genera
239 to avoid the necessity of the service of proces
upon him by authorizing an appearance jus
as any other party defendant may do? Literally
there is no provision authorizing such an appear
ance, but it seems to me very obvious that th
purpose of Congress was no more than to say
that the Director General should be a party de
fendant by the same procedural method as any
other individual becomes such. There certainly
can be no conceivable purpose in supposing tha
the mere delivery of a piece of paper like a mon
ition to one of these agents was within the inten
of Congress, and so far as I can see, no dif
240 ference whatever arises whether we assume tha
the Director General is allowed to appear a
any other party respondent is allowed, o
whether we insist that he be served with
monition. Such an interpretation of the statut
would be formal and archaic in the extreme.
take it we are bound to give to the purpose o
Congress fair latitude, and when a Directo
General is subjected to service like an individual
it is to be assumed that the ordinary methods o

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bringing him before the court are available, both to the parties who sue him and to him if he wishes to avoid the purest of formalities.

I therefore overrule this point of jurisdiction and direct that an interlocutory decree pass in favor of the libellant in each of the three libels, to ascertain their damage. As I have already said, a question may subsequently arise as to the right of the Director General to limit. This case may then involve the question whether the tug Mahanoy or the tug Transfer No. 20 was at fault in the ordinary admiralty sense for this collision. It obviously cannot arise unless the 242
sum of all the recoveries here is greater than the value of the lesser tug, which is the Mahanoy. It is quite possible that the aggregate of all the damages may be less than the value of the Mahanoy, and it seems to me proper that that point should be reserved until the damages have been liquidated and when they are, and if they are greater than the value of the Mahanoy, it perhaps will become necessary, then perhaps if the parties cannot come to an accomodation, I shall have to decide whether the Mahanoy is to be surrendered in limitation or the Transfer No. 20, but until that fact appears it is obviously 243
unnecessary to determine that question.

244 **Order.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 11th day of January, 1922.

Present:

Honorable LEARNED HAND,
District Judge.

245

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, as Director General of Railroads, and Agent (Lehigh Valley Transportation Company),
Respondent,

246 and

WALKER D. HINES, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad),
Respondent-Impleaded.

The respondent-impleaded, John Barton Payne, as successor to Walker D. Hines, Director General of Railroads, as Agent (New York,

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New Haven & Hartford Railroad) having regularly moved for an order dismissing, without costs, the libel and petition of Walker D. Hines, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),

Now, after reading and filing the bill of exceptions interposed by the respondent-impleaded and the notice of motion dated October 7th, 1920, with admission of service of a copy thereof upon the proctors for the libellant and for the respondent on the 8th day of October, 1920, and upon all the papers and proceedings heretofore had herein, and after hearing William L. Barnett, Esquire, advocate on behalf of the respondent-impleaded in favor thereof, and Henry B. Potter, Esquire, advocate on behalf of the respondent in opposition thereto, and due deliberation having been had thereon, and on motion of Charles M. Sheafe, Jr., proctor for the respondent-impleaded, it is hereby

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ORDERED, that the exceptions interposed by John Barton Payne, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad) as successor to Walker D. Hines, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad), be, and the same hereby are sustained; and on like motion, it is hereby further

249

ORDERED, that the libel and petition be and the same hereby are dismissed without costs as against the said respondent-impleaded.

LEARNED HAND,
U. S. D. J.

250

Interlocutory Decree.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the Post-Office Building, Borough of Manhattan, City of New York, on the 18th day of February, 1922.

251 Present:

HON. LEARNED HAND,
District Judge.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

252 JAMES C. DAVES, Director General of Railroads, as Agent under Section 206 of the Transportation Act of 1920.
Respondent.

This cause, which was originally brought against Walker D. Hines, Director General of Railroads, as agent under Section 206 of the Transporation Act, 1920, for a cause of action arising out of the operation of the steamtug

253 "Mahanoy" by the Director General of Railroads, (which steamtug was owned by the Lehigh Valley Transportation Company), having been duly heard upon the pleadings and proofs, and argued and submitted by the proctors for the respective parties, and the Court having rendered its decision at the close of the arguments, it is now, upon motion of Alexander & Ash, proctors for libellant

ORDERED that James C. Davis, now Director General and Agent as aforesaid, be substituted 254 as respondent in place and stead of said Walker D. Hines, formerly said Director General and said agent, without prejudice to any of the proceedings heretofore had in the cause; and in conformity with said decision, it is

ORDERED, ADJUDGED AND DECREED that the libellant herein recover against the respondent James C. Davis, as Director General and agent as aforesaid, the damages sustained by libellant by reason of the matters and things set forth in the libel, with interest and costs; and it is 255 further

ORDERED that it be referred to E. Curtis Rouse, Esq., as Special Commissioner, to ascertain and compute the libellant's said damages and report thereon to the Court with all convenient speed.

L. HAND,
U. S. D. J.

256

Citation.

THE PRESIDENT OF THE
UNITED STATES OF AMERICA,

To the Marshal of the Southern District of New York,

Greeting:

Whereas, a Libel was filed in the District
257 Court of the United States of America for the Southern District of New York, on February 19th, 1920, by the New Jersey Shipbuilding & Dredging Company, Libellant, against Walker D. Hines, Director General of Railroads (Lehigh Valley Transportation Company); And whereas said libel was amended by substituting James C. Davis, Director General of Railroads, as Agent (Lehigh Valley Transportation Company) in the place and stead of Walker D. Hines, as Director General of Railroads as aforesaid, by order entered in this court on the 20th
258 day of February, 1922, Respondent; in a certain cause civil and maritime, for damages for collision therein alleged to be due and owing to said Libellant, amounting to $60,000 and praying that a citation may issue against the said respondent pursuant to the rules and practice of this court.

Now, therefore, we do hereby command you, the said Marshal, to cite and admonish the said respondent, if found in your District, to be and

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appear before the said District Court on the 7th day of March, 1922, at 10:30 A. M., at the Clerk's Office thereof, in the U. S. Court House and Post-Office Building, in the Borough of Manhattan, City of New York, then and there to file appearance and stipulation for costs, and to answer or except to said Libel within two weeks thereafter, otherwise the Libellant may enter an interlocutory or final decree as may be proper; and have you then and there this writ with your return thereon.

260

WITNESS, the Hon. LEARNED HAND, Judge of said court, at the Borough of Manhattan, City of New York, in said District, this 27th day of February in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL]

ALEX. GILCHRIST, JR.,
Clerk.

ALEXANDER & ASH,
Proctors for Libellant.

261

262

Notice of Appearance.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
263 JAMES C. DAVIS, Agent (Lehigh Valley Transportation Co.),
Respondent.

SIR:

PLEASE TAKE NOTICE, That James C. Davis Agent, the Respondent above named, appears in this action, and that we are retained as his Proctors.

264 Dated, New York, March 6, 1922.

Yours, etc.,

BIGHAM, ENGLAR & JONES,
Proctors for Respondent,
64 Wall Street,
New York City.

To:

ALEXANDER & ASH,
Proctor for Libellant.

UNITED STATES *v.* STATE OF OKLAHOMA.

IN EQUITY.

No. 25, Original. Argued on motion to dismiss January 2, 1923.—Decided February 19, 1923.

1. The right to priority of payment provided for by Rev. Stats., § 3466, attaches when the conditions specified by the section come into existence; and it cannot be impaired or superseded by a state law. P. 259.
2. The State of Oklahoma acquires no lien on the assets of a state bank under § 303 of c. 6, Rev. Laws Okla. 1910, before possession of the bank has been taken by the state bank commissioner. P. 260.
3. The word "insolvent," as used in Rev. Stats., § 3466, and the Bankruptcy Law, applies only where a debtor's property is insufficient to pay all his debts. P. 260.
4. But "insolvent," in the sense of the Oklahoma statute, *supra*, where it authorizes the bank commissioner, upon becoming satisfied of a bank's insolvency, to take possession and wind up its affairs, is a broader term, applicable where a bank is unable to pay depositors in the ordinary course of business, though its assets may exceed its debts. *Id.*
5. Such a taking over of a bank by the act of the commissioner upon a finding by him of its insolvency, does not establish the right of the United States to priority of payment under Rev. Stats., § 3466, because it does not imply insolvency within the

meaning of that section and does not otherwise satisfy its conditions, either as a voluntary assignment, as an attachment of assets of an absconding, concealed or absent debtor, or as an act of bankruptcy, as defined by the Bankruptcy Act (§ 3a) or any law of the State. P. 262.

Bill dismissed.

UPON motion to dismiss the bill in a suit instituted in this Court by the United States against the State of Oklahoma, in which the plaintiff sought to establish a right of priority of payment out of the assets of a liquidating Oklahoma bank, in which it had deposited moneys as guardian of individual Indians.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. S. W. Williams*, Special Assistant to the Attorney General, were on the brief, for the United States.

The State of Oklahoma is the proper party defendant and this Court has original jurisdiction. When a state bank in Oklahoma becomes insolvent the State, by the action of its bank commissioner, acquires title to the bank's assets. *State* v. *Cockrell*, 27 Okla. 630. Consequently a suit against the bank commissioner is in effect a suit against the State.

Assets of an insolvent state bank in Oklahoma are subject to the Government's claim as a prior creditor under Rev. Stats., § 3466.

Whenever a debtor is divested of his property in any of the ways mentioned in this section, the "person who becomes invested with the title is thereby made a trustee for the United States and is bound to pay their debt first out of the proceeds of the debtor's property". *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 132. But, to entitle the United States to priority, there must be bankruptcy or insolvency as the latter is defined by the statutes or the authorities.

The bank in this case was adjudged insolvent by the bank commissioner, who under the law was authorized to take such action. Revised Laws Oklahoma, 1910, § 302.

The position of the bank commissioner in taking charge of the bank's affairs and collecting and distributing its assets is, under the state decisions, analogous to that of a receiver or trustee in bankruptcy or of an assignee for the benefit of creditors. *Briscoe* v. *Hamer*, 50 Okla. 281.

As stated, therefore, the case is one where the United States is entitled to be paid first, unless by reason of § 303 of the state law the state itself has a prior lien on the bank's assets for the benefit of the depositors' guaranty fund.

Under § 303, Rev. Laws Oklahoma, 1910, the lien of the State does not attach until the bank commissioner takes possession of the bank and its assets. Before he may do that, he must find the bank to be insolvent, and immediately upon his doing that the priority of the United States attaches. The State, therefore, has no anterior lien such as would take precedence over the claim of the United States. Moreover, the laws of the State cannot create priority in favor of other creditors and so defeat the priority of the United States. *Field* v. *United States*, 9 Pet. 182, 200.

That priority does not yield to any claim of creditors, however high may be the dignity of their debt. *Conrad* v. *Atlantic Insurance Co.*, 1 Pet. 386.

There is no force in the argument that by depositing the money in the state bank the United States consented to the State's method of distributing the bank's funds and thereby waived its claim to priority, because Congress alone has power to waive rights of the Government, and there is no pretense that Congress has done so in this case. Nor was the United States compelled to proceed on the bond of the surety company before enforcing its direct remedy against the debtor, for the settled rule of equity is to the contrary. *Lewis* v. *United States*, 92 U. S. 618.

The United States is entitled to priority in regard to moneys which it has deposited as guardian of the Indians.

Mr. William H. Zwick, with whom *Mr. George F. Short*, Attorney General of the State of Oklahoma, was on the brief, for defendant.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit commenced in this Court by the United States against the State of Oklahoma to establish priority in favor of the United States under § 3466 of the Revised Statutes and to have a debt owing by the state bank of Guthrie, Oklahoma, paid before any distribution of the assets of the bank.

The case was heard on the motion of the State to dismiss the complaint on the ground that the allegations thereof are not sufficient to constitute a cause of action.

The facts as set forth in the complaint are in substance the following. The bank was organized under the laws of Oklahoma, and was engaged in a general banking business at Guthrie until, October 26, 1921, it was found insolvent under the state law and unable to pay its debts and unable to continue as a going banking concern. The United States, under various acts of Congress, is guardian of certain incompetent and restricted Indians residing within Oklahoma, and as such guardian caused to be deposited in that bank certain sums of money received by the United States, through the office of the superintendent of the Five Civilized Tribes in Oklahoma, on account of certain individual members and allottees of such tribes who were incompetent and restricted and wards of the United States. Before such deposit was made the bank, pursuant to regulations prescribed by the Secretary of the Interior, delivered to the United States a bond with the Fidelity and Casualty Co. of New York as surety thereon to secure the payment of such funds, and that bond is in

force; on October 26, 1921, the sum so deposited and due the United States amounted to not less than $42,000 with interest. October 7, 1921, a state bank examiner made an examination of the bank and found that it was insolvent under the Oklahoma law and unable to pay its debts and to continue as a going banking concern, and so reported to the bank commissioner who, on October 26, 1921, adjudged the bank insolvent and took charge and possession of its assets, books and records for the purposes specified in the state depositors' guaranty fund law. The assets of the bank so taken and now in the possession of the bank commissioner are in excess of the amount claimed by the United States; and the United States claims to be entitled to have its debt first satisfied in full out of such assets, before other creditors are paid anything. Demand for such prior payment was made by the United States and refused by the State.

The claim of priority asserted by the United States is based upon § 3466 of the Revised Statutes of the United States, which provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The applicable provisions of the Oklahoma statutes are found in c. 6 of the Revised Laws of Oklahoma, 1910. A state banking board is created and given the supervision and management of a depositors' guaranty fund, created by levying assessments against the capital stock of each bank and trust company.

The provision of § 302, under which possession of the bank and its assets were taken, is as follows:

"Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

The State asserts a lien superior to the priority rights of the United States, under § 303, which is as follows:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

The United States, asserting that it is not bound first to proceed on the bond of the surety company (citing

Lewis v. *United States*, 92 U. S. 618), invokes jurisdiction of this Court on the ground that, when the bank and its assets were taken over by the State through its bank commissioner, the State acquired title to the same and is therefore the proper party to be sued. *State* v. *Cockrell*, 27 Okla. 630; *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461; *American Water Co.* v. *Lankford*, *id.* 496; *Farish* v. *State Banking Board*, *id.* 498. No objection to jurisdiction is made by the State; and the State does not deny that the United States is entitled to priority on account of money deposited by it as guardian of the Indians to the same extent as in the case of any other deposit. The State's contentions are that § 3466 properly construed does not give the United States priority; that the State has a lien on the bank's assets, and that the priority rights (if any) of the United States are subject thereto; and that priority rights under the act do not apply where a sovereign State has a lien against its debtor.

Section 3466 relied on by the Government is a reënactment and extension of § 65, Act of March 2, 1799, 1 Stat. 676; and the same or equivalent language, so far as the question here involved is concerned, is found in earlier statutes. Act of March 3, 1797, c. 20, § 5, 1 Stat. 515; also, Act of May 2, 1792, c. 27, § 18, 1 Stat. 263; Act of August 4, 1790, c. 35, § 45, 1 Stat. 169; Act of July 31, 1789, c. 5, § 21, 1 Stat. 42. It has been considered in a number of cases in this Court. The claim of the United States to the asserted priority rests exclusively upon the statute. No lien is created by it. It does not overreach or supersede any *bona fide* transfer of property in the ordinary course of business. It establishes priority which is limited to the particular state of things specified. The meaning of the word "insolvent" used in the act and of the insolvency therein referred to is limited by the language to cases where "a debtor, not having sufficient

property to pay all his debts, makes a voluntary assignment", etc. Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35; *United States* v. *Fisher*, 2 Cranch, 358, 390; *United States* v. *Hooe*, 3 Cranch, 73, 90; *Prince* v. *Bartlett*, 8 Cranch, 431, 433; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 439; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611; *Field* v. *United States*, 9 Pet. 182, 201. Where the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 102, 133–135. The priority given the United States cannot be impaired or superseded by state law. If priority in favor of the United States attaches at all, it takes effect immediately upon the taking over of the bank. The State has no lien on the assets of the bank before the taking of such possession by the bank commissioner.

Does § 3466 apply? It requires that there shall be an insolvent debtor "not having sufficient property to pay all his debts." The complaint does not allege that the bank's assets were not sufficient to pay all its debts. After stating that the bank examiner found that it was insolvent and unable to pay all its debts and unable to continue as a going banking concern, and that the bank commissioner pursuant to the authority vested in him by the laws of the State adjudged the bank insolvent and thereupon took charge and possession of its assets for the purposes of liquidation, the complaint does allege that the bank was and is insolvent. But the word "insolvent" is used in

different senses. Section 3466 makes it apply only in cases where the debtor "not having sufficient property to pay all his debts, . . ." The Bankruptcy Act of July 1, 1898, c. 541, § 1, 30 Stat. 544, provides:

"A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

In § 302 of the Oklahoma law, the meaning of "insolvency" of a bank is not so limited, and, when regard is had to other provisions of the Oklahoma state depositors' guaranty fund law and its object—the full and prompt payment of depositors in banks unable to carry on as going banking concerns—it is clear that the meaning there intended is not the same as in § 3466 or in the Bankruptcy Act. The bank commissioner under the Oklahoma law properly may "become satisfied" of the insolvency of a state bank whenever it is unable to pay its depositors in ordinary course of business and is unable to continue as a going banking concern, even though it has sufficient property to pay all its debts and is not insolvent within the meaning of § 3466 or the Federal Bankruptcy Act. This view is in harmony with the meaning of insolvency as defined by the Supreme Court of Oklahoma: "Independent of statute, it may generally be said that insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business. The definition is one generally accepted by both the state and federal courts." *Oklahoma Moline Plow Co.* v. *Smith*, 41 Okla. 498, 503.

The allegations of the complaint do not show the debtor to be insolvent within the meaning of § 3466 or of the Bankruptcy Act.

It remains to be considered whether an act of bankruptcy was committed. In order to give the priority specified in § 3466, there must be a case of an insolvent debtor who makes a voluntary assignment of his property, or a case in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or a case in which an act of bankruptcy is committed. In this case it is not alleged that the Oklahoma state bank voluntarily placed itself in the hands of the bank commissioner under § 302 or that it made a voluntary assignment of its property, but it is alleged that the bank commissioner adjudged it insolvent and took charge and possession of its assets. No action on the part of the bank was necessary, and none is alleged. And it is plain that the case is not within the absconding, concealed or absent debtor clause.

The complaint does not expressly allege that the bank committed any act of bankruptcy or state any facts as constituting an act of bankruptcy. But it is claimed that the position of the bank commissioner in taking charge of the bank's affairs under § 302 is analogous to that of a receiver or a trustee in bankruptcy, or that of an assignee for the benefit of creditors. The facts set forth in the complaint do not constitute an act of bankruptcy as defined by the Federal Bankruptcy Act (§ 3a). There is not alleged any conveyance to defraud, or preference through transfer or through legal proceedings, or general assignment for the benefit of creditors. Nor is the case within the meaning of the last clause of § 3a (4) "or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State . . ." The allegations do not show insolvency within the meaning of § 3466 or of the Bankruptcy Act. The insolvency contemplated by § 302 of the state law is not the same or equivalent condition. The bank commissioner does not take possession because of the existence of insolvency

within the meaning of these federal laws. He is not a receiver or trustee put in charge because of any such insolvency. He acts as an arm or instrumentality of the State in the exercise of its police powers to effect the purpose of the law for the protection of depositors. It would defeat the purpose of that law to require that the bank must be insolvent within the meaning defined in § 3466 or in the Bankruptcy Law before the benefit of the state law can be made available to depositors. A primary purpose of his possession is the prompt payment of depositors by the use of the state guaranty fund to the extent necessary, and the case is to be distinguished from that defined in the Bankruptcy Act, and the commissioner is not a receiver or trustee within its meaning. The legislation of Oklahoma, so far as banks are concerned, does not define acts of bankruptcy or deal with bankrupt or insolvent banks otherwise than by the state law herein referred to.

As insolvency within the meaning of § 3466 was not necessary for the taking of possession by the bank commissioner and is not shown to exist, and as no act of bankruptcy as defined by applicable federal legislation on the subject of bankruptcies or as defined by any law of Oklahoma is shown to have been committed, and as the debtor bank was not divested of its assets in one of the modes specified in § 3466, the case is not within that section.

The State's motion to dismiss the complaint is granted.

Bill dismissed.